THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

R

REFERENCE ONLY

Mx North Gallery

UNIVERSITY OF LONDON
LIBRARY

THE
LAW REPORTS
1957

Probate, Divorce, and Admiralty Division

and on Appeal therefrom in the

Court of Appeal

and Decisions in the

Ecclesiastical Courts

London
THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES

*Published by the Incorporated
Council of Law Reporting for
England and Wales · 3 Stone
Buildings, Lincoln's Inn, London,
W.C.2, and printed by The
Eastern Press, Ltd., London and
Reading*

BIBL.
LONDIN.
UNIV.

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES

MEMBERS OF THE COUNCIL

Chairman—The Hon. Mr. Justice McNair

Vice-Chairman—Sir Leslie Farrer, K.C.V.O.

*

EX-OFFICIO MEMBERS

The Rt. Hon. Sir Reginald Manningham-Buller, Q.C., M.P.
Attorney-General

The Rt. Hon. Sir Harry Hylton-Foster, Q.C., M.P.
Solicitor-General

I. D. Yeaman, Esq.
President of The Law Society

*

ELECTED MEMBERS

Lincoln's Inn

The Rt. Hon. Lord Justice Jenkins   C. Montgomery White, Esq., Q.C.

Inner Temple

R. E. Burrell, Esq., Q.C.   J. V. Nesbitt, Esq.

Middle Temple

W. Latey, Esq., M.B.E., Q.C.   Montague L. Berryman, Esq., Q.C.

Gray's Inn

The Hon. Mr. Justice McNair   S. E. Pocock, Esq., O.B.E. (died 29.10.57)
* A. G. P. Johnson, Esq.

Appointed on the nomination of the General Council of the Bar

H. Edmund Davies, Esq., Q.C.   R. E. Megarry, Esq., Q.C.

The Law Society

Sir Leslie Farrer, K.C.V.O. (Firm: Messrs. Farrer & Co.)
Kenneth D. Cole, Esq. (Firm: Messrs. Linklaters & Paines)

* Co-opted Member.

*

Secretary—F. G. Hudson, Esq.   *Assistant Secretary*—F. E. Smith, Esq.
3 Stone Buildings, Lincoln's Inn, W.C.2

EDITORS AND REPORTERS

*

Editor—R. P. Colinvaux, Barrister-at-Law

Assistant Editor—Charles Clayton, Barrister-at-Law

*

REPORTERS

House of Lords
F. H. Cowper

Privy Council
Charles Clayton

Court of Appeal No. 1
B. A. Bicknell E. Dangerfield

Court of Appeal No. 2
A. W. Grant

Court of Appeal No. 3
F. R. Dymond M. M. Hill

Chancery Division
J. L. Denison K. R. A. Hart I. G. R. Moses
J. A. Griffiths

Queen's Bench Division, Court of Criminal Appeal and Courts-Martial Appeal Court
J. D. Pennington J. F. Lamb C. J. Ellis
E. M. Wellwood R. P. Price

Probate and Divorce
J. B. Gardner E. Jones

Admiralty Division
A. L. G. Stewart-Richardson

Barristers-at-Law

JUDGES

OF

THE COURT OF APPEAL

1957

Lord Kilmuir, Lord Chancellor

Lord Goddard, Lord Chief Justice of England

Lord Evershed, Master of the Rolls

Lord Merriman	President of the Probate, Divorce, and Admiralty Division
Sir John Edward Singleton (died Jan. 6, 1957) Sir Alfred Thompson Denning (created a Lord of Appeal April 24, 1957) Sir David Llewelyn Jenkins Sir William Norman Birkett (retired Jan. 5, 1957) Sir Francis Lord Charlton Hodson Sir John William Morris Sir Charles Robert Ritchie Romer Sir Hubert Lister Parker Sir Frederic Aked Sellers Sir Benjamin Ormerod Sir Edward Holroyd Pearce	Lords Justices

JUDGES
OF THE
PROBATE, DIVORCE, AND ADMIRALTY DIVISION
OF
THE HIGH COURT OF JUSTICE
1957

Lord MERRIMAN, President

Sir HUBERT JOSEPH WALLINGTON

Sir HENRY WILLIAM BARNARD

Sir HENRY GORDON WILLMER

Sir CHARLES ARTHUR COLLINGWOOD

Sir SEYMOUR EDWARD KARMINSKI

Sir WILLIAM ARTHIAN DAVIES

Sir ERIC SACHS

Sir AUBREY MELFORD STEVENSON

Attorney-General

Sir REGINALD EDWARD MANNINGHAM-BULLER

Solicitor-General

Sir HARRY BRAUSTYN HYLTON-FOSTER

The Mode of Citation of the Volumes of the *Law Reports* for 1957, is as follows:—

[1957] Ch. [1957] P.
[1957] 1 Q.B. [1957] 2 Q.B.
[1957] A.C.

TABLE OF CASES REPORTED
IN THIS VOLUME

PAGE

A

Alsey Steam Fishing Co. Ltd. *v.* Hillman. The Kirknes - 51
Anyan, Scott and, Scott *v.* - 1
Arnold *v.* Arnold - - - 237

B

Barnett *v.* Barnett. Brown Intervening - - - 78
Boulton *v.* Boulton - - 9
British Transport Commission, Rederi A/S Norseman and Rederi A/S Norse Lady *v.* The Norseman - - - 224
Brown *v.* Lloyd (*orse.* Brown) and Lloyd - - - - 367
Brown Intervening. Barnett *v.* Barnett - - - - 78

C

C. *v.* C. - - - - 385
Coles *v.* Coles - - - 68
Corchester, The - - - 84

D

Davies *v.* Davies - - - 357
Day *v.* Day - - - - 202

E

Easterbrook *v.* Easterbrook - 192
Ericbank, Panther and, Trishna (Master, Owners and Crew) *v.* - - - - 143

PAGE

F

Farrant *v.* Farrant - - 188

G

Gill *v.* Gill - - - - 151

H

Hammond *v.* Hammond - 349
Hillman, Alsey Steam Fishing Co. Ltd. *v.* The Kirknes - 51
Hulbert *v.* Hulbert - - 174

K

Kirknes, The. Alsey Steam Fishing Co. Ltd. *v.* Hillman 51

L

L. *v.* L. - - - - 385
Levett *v.* Levett and Smith - 156
Lloyd, Brown *v.* - - - 367

M

M. *v.* M. (*orse.* B.) - - 139

N

N. *v.* N. - - - - 385
N. *v.* N. and L. - - - 333
National Assistance Board, Taylor (formerly Kraupl) *v.* 101
Nokes *v.* Nokes - - - 213
Norseman, The - - - 224

PAGE

P

Panther (Owners) and Ericbank, Trishna (Owners, Master and Crew) *v.* - - 143
Postlethwaite *v.* Postlethwaite 193

R

Rederi A/S Norseman and Rederi A/S Norse Lady *v.* British Transport Commission. The Norseman - - 224
Roebuck, Russell and, Russell *v.* - - - - - - 375
Russell *v.* Russell and Roebuck - - - - - 375

S

St. Elefterio, The - - - 179
Schwarz & Co. (Grain) Ltd. *v.* St. Elefterio ex Arion (Owners). The St. Elefterio 179
Scott *v.* Scott and Anyan - 1
Smith, Levett and, Levett *v.* 156
Sterne *v.* Sterne - - - 168
Sugden *v.* Sugden - - - 120

T

Taczanowska (*orse.* Roth) *v.* Taczanowski - - - 301
Taylor (formerly Kraupl) *v.* National Assistance Board - 101
Telemachus, The - - - 47
Thompson *v.* Thompson - 19
Trishna (Owners, Master and Crew) *v.* M.S.C. Panther and Ericbank (Owners) - 143

W

Wood *v.* Wood - - - 254

TABLE OF CASES CITED AND JUDICIALLY NOTICED

ABBREVIATIONS

Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

			PAGE
Abson *v.* Abson	[1952] P. 55; [1952] 1 T.L.R. 379; [1952] 1 All E.R. 370		260
Adams *v.* Adams	[1914] P. 155	*R.*	14, 15, 18
Adams *v.* Naylor	[1946] A.C. 543		352
Adler *v.* Dickson	[1955] 1 Q.B. 158; [1954] 3 All E.R. 397	*C.*	52, 65, 66
Admiralty Commissioners *v.* Valverda (Owners)	[1938] A.C. 173		56
Alexander *v.* Jenkins	[1892] 1 Q.B. 797; 8 T.L.R. 421	*R.*	327
Allchin *v.* Coulthard	[1943] A.C. 607; 59 T.L.R. 396; [1943] 2 All E.R. 352	*R.*	233
Allen *v.* Allen	[1894] P. 134		109
Allen *v.* Allen and D'Arcy	2 Sw. & Tr. 107		351
Amand, *In re*	[1941] 2 K.B. 239		304
Amis, Swain & Co. *v.* Nippon Yusen Kabushiki Kaisha	1 Ll.L.Rep. 51	*R.*	184
Arizona, The	5 P.D. 123	*R.*	96
Armitage *v.* Attorney-General	[1906] P. 135; 22 T.L.R. 306	*Appl.*	238, 253
Arnold *v.* Arnold	The Times, Dec. 10, 1952	*R.*	251
Attorney-General *v.* Gaskill	20 Ch.D. 519		176
Attorney-General for Trinidad and Tobago *v.* Eriché	[1893] A.C. 518		219
Bailey *v.* Bailey	13 Q.B.D. 855		131
Barber *v.* Barber	[1954] P. 442; [1954] 2 All E.R. 307		378
Bass *v.* Bass	[1915] P. 17		176
Bater *v.* Bater	[1906] P. 209; 22 T.L.R. 408	*R.*	245, 261
Bates *v.* Bates	14 P.D. 17; 5 T.L.R. 155	*Dist.*	188, 191
Beard *v.* Beard	[1946] P. 8: 61 T.L.R. 555; [1945] 2 All E.R. 306		194
Beard *v.* Beard	[1946] P. 8; 61 T.L.R. 555; [1945] 2 All E.R. 306	*R.*	365
Beaumont *v.* Beaumont	[1933] P. 39; 49 T.L.R. 35	*R.*	128
Bell *v.* Kennedy	L.R. 1 Sc. & D. 307		379
Bendall *v.* McWhirter	[1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307	*Appl.*	68, 76
Berthiaume *v.* Dastous	[1930] A.C. 79; 45 T.L.R. 607	*R.*	314, 318, 324, 328

Berwickshire, The	[1950] P. 204; 66 T.L.R. (Pt. 1) 568; [1950] 1 All E.R. 699		227
Bidie, decd., *In re*, Bidie *v.* General Accident Fire and Life Assurance Corporation Ltd.	[1948] Ch. 697		131
Binney *v.* Binney and Hill	[1936] P. 178; 52 T.L.R. 481; [1936] 2 All E.R. 409	*R.*	372
Bland *v.* Bland	L.R. 1 P. & M. 237		30
Blunt *v.* Blunt	[1943] A.C. 517; 59 T.L.R. 315; [1943] 2 All E.R. 76		159
Boettcher *v.* Boettcher	[1949] W.N. 83	*Appl.*	255, 262, 296
Boileau *v.* Rutlin	2 Ex. 665		219
Bowie (or Ramsay) *v.* Liverpool Royal Infirmary	[1930] A.C. 588; 46 T.L.R. 465		379
Boyd, *In re*	[1895] 1 Q.B. 611	*R.*	128
Bragg *v.* Bragg	[1925] P. 20; 41 T.L.R. 8	*Appl.*	255, 262–266, 276–283, 285, 291, 292. 294, 295, 297, 298
Bright *v.* Bright	[1954] P. 270; [1953] 2 All E.R. 939	*C.*	20, 30, 31, 38, 39, 44
British Columbia Electric Railway Co. Ltd. *v.* Loach	[1916] 1 A.C. 719	*R.*	97
British Columbia Electric Railway Co. *v.* Loach	[1916] 1 A.C. 719	*R.*	211
British Transport Commission *v.* Gourley	[1956] A.C. 185; [1955] 3 All E.R. 796	*Appl.*	47, 50
Brook *v.* Brook	3 Sm. & G. 481		303
Brougham *v.* Brougham	[1895] P. 288	*Appl.*	368, 373, 374
Brown *v.* Brown	[1952] 1 T.L.R. 930; [1952] 1 All E.R. 1018		350
Brown *v.* Draper	[1944] K.B. 309; 60 T.L.R. 219; [1944] 1 All E.R. 246	*R.*	76
Buccinum, The	55 Ll.L.Rep. 205	*R.*	149
Burn *v.* Farrar	2 Hag.Con. 369	*R.*	321, 330, 332
Burne *v.* Burne and Helvoet	[1920] P. 17	*Appl.*	1, 7
Burroughes *v.* Abbott	[1922] 1 Ch. 86; 38 T.L.R. 167	*R.*	127
Butler *v.* Butler	[1894] P. 25; 10 T.L.R. 26		25
Butterworth *v.* Butterworth and Englefield	[1920] P. 126; 36 T.L.R. 265		4
Capron *v.* Capron	[1927] P. 243; 43 T.L.R. 667	*R.*	75
Carr *v.* Carr	[1955] 1 W.L.R. 422; [1955] 2 All E.R. 61	*Appl.*	238, 248
Caterall *v.* Caterall	1 Rob.Ecc. 580		303
Chandler *v.* Webster	[1904] 1 K.B. 493; 20 T.L.R. 222		182
Chappell *v.* North	[1891] 2 Q.B. 252; 7 T.L.R. 563	*R.*	381
Chard *v.* Chard	[1956] P. 259; [1955] 3 All E.R. 721	*C.*	385, 390
Coles *v.* Coles	[1956] 3 W.L.R. 861; [1956] 3 All E.R. 542		124

Coombs *v.* Coombs	L.R. 1 P. & M. 218		170
Cooper *v.* Cooper (King's Proctor showing cause)	[1940] P. 204; 57 T.L.R. 49; [1940] 3 All E.R. 579	*R.*	92
Cooper *v.* Cooper (No. 2)	[1955] P. 168; [1954] 3 All E.R. 358	*R.*	39, 46
Craig *v.* Craig	[1896] P. 171; 12 T.L.R. 375		131
Crewe *v.* Crewe	3 Hagg.Ecc. 123	*R.*	38
Cunnington *v.* Cunnington and Noble	1 Sw. & Tr. 475		194
Daimler Co. Ltd. *v.* Continental Tyre and Rubber Co. (Great Britain) Ltd.	[1916] 2 A.C. 307; 32 T.L.R. 624	*R.*	355
Dalrymple *v.* Dalrymple	2 Hag.Con. 54	*R.*	329
Dee Conservancy Board *v.* McConnell	[1928] 2 K.B. 159	*R.*	60
Dewe *v.* Dewe	[1928] P. 113; 44 T.L.R. 274		169
Dipple *v.* Dipple	[1942] P. 65; 58 T.L.R. 141; [1942] 1 All E.R. 234	*E.*	121, 126, 127, 135, 136
Dixon *v.* Dixon	[1953] P. 103; [1953] 1 All E.R. 910	*R.*	31
Donaldson *v.* Donaldson	[1949] P. 363; 65 T.L.R. 233		244
Drost *v.* Drost and Hanson	[1942] 1 D.L.R. 72	*N.F.*	368, 371, 372
Dundee, The	2 Hagg.Adm. 137		227
Dunne *v.* Saban	[1955] P. 178, 190; [1954] 3 All E.R. 586	*R.*	161
Dunne *v.* Saban	[1955] P. 178; [1954] 3 All E.R. 586	*N.F.*	238, 249
E. *v.* E.	24 T.L.R. 78	*R.*	178
Eastwood and Holt *v.* Studer	31 Com.Cas. 251		219
Eaves *v.* Eaves and Powell	[1956] P. 154; [1955] 3 All E.R. 849	*R.*	350, 354
Estin *v.* Estin	334 U.S. 541	*Appl.*	255, 284–289, 291, 292, 296, 299, 300
Euston *v.* Smith	9 P.D. 57		176
Evans *v.* Evans and Blyth	[1904] P. 274; 20 T.L.R. 516		220
Ewer *v.* Board of Trade	7 R. (Ct. of Sess., 4th series) 835	*R.*	100
Ewer *v.* Ewer and Charlton	36 T.L.R. 517		4
Faulkner *v.* Faulkner	57 T.L.R. 628; [1941] 2 All E.R. 748	*Appl.*	376, 380, 384
Findlay *v.* Railway Executive	[1950] W.N. 570; 66 T.L.R. (Pt. 2) 836; [1950] 2 All E.R. 969		227
Finney *v.* Finney	L.R. 1 P. & M. 483	*Dist.*	20, 30, 37, 38, 44
Forsyth *v.* Forsyth	[1948] P. 125; 64 T.L.R. 17; [1947] 2 All E.R. 623		269
Francis *v.* Francis and Dickerson	[1956] P. 87; [1955] 3 All E.R. 836		352
Friesland, The	[1904] P. 345; 20 T.L.R. 699	*C.*	52, 65

Furness Withy & Co. *v.* Duder	[1936] 2 K.B. 461; [1936] 2 All E.R. 119	*R.*	60
G—— *v.* G——	L.R. 2 P. & M. 287	*Appl.*	139, 142
Gatty *v.* Attorney-General	[1951] P. 444; [1951] 2 T.L.R. 599	*R.*	254
Gibbs *v.* Gibbs	[1952] P. 332; [1952] 1 T.L.R. 1143; [1952] 1 All E.R. 942	*R.*	354
Gooch *v.* Gooch	[1893] P. 99; 9 T.L.R. 303	*R.*	347
Great Western Railway Co. *v.* Royal Norwegian Government	61 T.L.R. 236; [1945] 1 All E.R. 324; 78 Ll.L. Rep. 152	*R.*	67
Greaves *v.* Greaves	[1948] W.N. 199; 92 S.J. 323		4
Gulbenkian *v.* Gulbenkian	54 T.L.R. 241; [1937] 4 All E.R. 618		379
H. *v.* H.	[1928] P. 206; 44 T.L.R. 711		245
Hall Brothers Steamship Co. *v.* Young	[1939] 1 K.B. 748; 55 T.L.R. 506; [1939] 1 All E.R. 809		54
Harriman *v.* Harriman	[1909] P. 123; 25 T.L.R. 291	*Appl.*	20, 30, 36, 37, 42
Har-Shefi *v.* Har-Shefi	[1953] P. 161; [1953] 1 All E.R. 783	*R.*	246
Harvey *v.* Lovekin	10 P.D. 122; 1 T.L.R. 136	*Appl.*	175, 177
Hastings, *In re*, *Ex p.* Brown	61 L.J.Q.B. 654; 8 T.L.R. 683	*Dist.*	68, 73, 75
Hawkins, *In re*	[1894] 1 Q.B. 25	*R.*	75
Heath *v.* Heath	[1950] P. 193; 66 T.L.R. (Pt. 1) 1093; [1950] 1 All E.R. 877		387
Hemsworth *v.* Hemsworth	[1946] K.B. 431; 62 T.L.R. 329; [1946] 2 All E.R. 117	*Appl.*	224, 234
Henderson *v.* Henderson	3 Hare 100	*R.*	46
Herd *v.* Herd	[1936] P. 205; 52 T.L.R. 709; [1936] 2 All E.R. 1516		245
Herod *v.* Herod	[1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722		153
Herod *v.* Herod	[1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722	*Appl.*	202, 207, 208, 211
Heskell *v.* Continental Express Ltd.	83 Ll.L.Rep. 438		181
Hill *v.* Hill	[1954] P. 291; [1954] 1 All E.R. 491	*R.*	31, 38, 39
Hinde *v.* Hinde	[1953] 1 W.L.R. 175; [1953] 1 All E.R. 171	*Appl.*	121, 134, 136, 137

Hollingsworth *v.* Hollingsworth	[1952] P. 277; [1952] 2 T.L.R. 202; [1952] 2 All E.R. 284	*C.*	157, 162
Hood Barrs *v.* Heriot	[1897] A.C. 177; 12 T.L.R. 288	*R.*	380
Hoystead *v.* Commissioner of Taxation	[1926] A.C. 155; 42 T.L.R. 207	*R.*	29, 42
Hoystead *v.* Commissioner of Taxation	[1926] A.C. 155		220
Hudson *v.* Hudson	[1948] P. 292; 64 T.L.R. 258; [1948] 1 All E.R. 773	*C.*	20, 30, 31, 36, 43
Hughes, *Ex p.*, *In re* Browne	L.R. 12 Eq. 137	*R.*	73
Hulbert & Crowe *v.* Cathcart	[1894] 1 Q.B. 244	*R.*	74
Hyams *v.* Stuart King	[1908] 2 K.B. 696; 24 T.L.R. 675		182
Hyde *v.* Hyde	[1948] P. 198; 64 T.L.R. 105; [1948] 1 All E.R. 362	*R.*	126, 127, 135
Igra *v.* Igra	[1951] P. 404; [1951] 2 T.L.R. 670	*Appl.* *F.*	255, 262, 296 237, 250
Inchmaree, The	[1899] P. 111		55
Ingram & Royle Ltd. *v.* Services Maritimes du Tréport	[1914] 1 K.B. 541	*R.*	61
Inland Revenue Commissioners *v.* Ballantine	8 T.C. 595		227
Inland Revenue Commissioners *v.* Hunter	[1914] 3 K.B. 423	*Appl.*	85, 93
Isaac *v.* Isaac	[1955] P. 333; [1955] 2 All E.R. 811	*R.*	354
Ivens *v.* Ivens	[1955] P. 129; [1954] 3 All E.R. 446	*R.*	81
J. *v.* J.	[1953] P. 186; [1952] 2 All E.R. 1129		169, 170
Jacobs *v.* Jacobs	[1943] P. 7; 59 T.L.R. 13; [1942] 2 All E.R. 471		133
Jackman *v.* Jackman	(Unreported, Sept. 27, 1956)		243
James *v.* James	[1948] 1 All E.R. 214	*C.*	20, 31, 37, 43
Jamieson *v.* Jamieson	[1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875	*R.*	39
Jerome, *In re*	[1907] 2 Ch. 145		352
Joannis Vatis (No. 2), The	[1922] P. 213; 38 T.L.R. 566	*Dist.*	225, 230, 231
Johnson *v.* Johnson	[1946] P. 205; 62 T.L.R. 333; [1946] 1 All E.R. 573	*Appl.*	224, 234
Jones *v.* Newtown and Llanidloes Guardians	[1920] 3 K.B. 381; 36 T.L.R. 758	*R.*	172
Kara *v.* Kara and Holman	[1948] P. 287; 64 T.L.R. 329; [1948] 2 All E.R. 16		26
Kent *v.* Burgess	11 Sim. 361		304

Kenward *v.* Kenward	[1951] P. 124; 66 T.L.R. (Pt. 2) 157; [1950] 2 All E.R. 297		303
Kerr *v.* Kerr	[1897] 2 Q.B. 439; 13 T.L.R. 534	*R.*	75
Kestrel, The	6 P.D. 182	*R.*	94
Key *v.* Key and Staples	[1957] 1 W.L.R. 220; [1956] 3 All E.R. 955n.		370
Kirk *v.* Kirk	[1947] W.N. 161; 63 T.L.R. 422; [1947] 2 All E.R. 118	*C.*	255, 265, 266, 276, 281, 282, 293, 294, 298
Kong Magnus, The	[1891] P. 223		227
Kwei Tek Chao and Others (Trading as Zung Fu Co.) *v.* British Traders and Shippers Ltd. N. V. Handelsmaatschappij J. Smits Import-Export	[1954] 2 Q.B. 459; [1954] 1 All E.R. 779		182
L. *v.* L.	[1931] P. 63; 47 T.L.R. 260	*C.*	334, 342–344
Lake *v.* Lake	[1955] P. 336; [1955] 2 All E.R. 538		27
Langmead *v.* Maple	18 C.B.N.S. 255	*R.*	221
Lazard Bros. & Co. *v.* Midland Bank Ltd.	[1933] A.C. 289; 49 T.L.R. 94		303
Leavis *v.* Leavis	[1921] P. 299; 37 T.L.R. 578	*Appl.*	188, 191
Le Mesurier *v.* Le Mesurier	[1895] A.C. 517; 11 T.L.R. 481	*R.*	252
Levett *v.* Levett and Smith	[1957] P. 156; [1957] 1 All E.R. 720	*Appl.*	376, 382–384
Lindsay *v.* Lindsay	[1934] P. 162; 50 T.L.R. 441	*Dist.*	214, 217, 218, 222, 223
Ling *v.* Ling and Croker	4 Sw. & Tr. 99		132
Linton *v.* Linton	15 Q.B.D. 239		75
Llewellyn *v.* Llewellyn	[1955] 1 W.L.R. 480; [1955] 2 All E.R. 110		370
Lloyd *v.* Petitjean	2 Curt. 251		316
Louis Dreyfus & Co. *v.* Tempus Shipping Co.	[1931] A.C. 726; 47 T.L.R. 542	*R.*	61
Lowe *v.* Lowe	[1952] P. 376; [1952] 2 T.L.R. 505; [1952] 2 All E.R. 671		370
Luccioni *v.* Luccioni	[1943] P. 49; 59 T.L.R. 202; [1943] 1 All E.R. 384	*C.*	385, 391, 393
Lynn *v.* Lynn	302 N.Y. 193; 97 N.E., 2d., 748	*R.*	296
Lyon *v.* Lyon	[1953] P. 1; [1952] 2 T.L.R. 775; [1952] 2 All E.R. 831		352
MacCarthy *v.* Agard	[1933] 2 K.B. 417	*R.*	92
Maclean *v.* Cristall	7 Notes of Cases, Sup. 17	*R.*	312, 327
M'Queen *v.* M'Queen	1920, 2 S.L.T. 405		269
Maher *v.* Maher	[1951] P. 342; [1951] 1 T.L.R. 1163; [1951] 2 All E.R. 37		242
Margaret, The	6 P.D. 76		146

Maxted *v.* Maxted	[1956] 1 W.L.R. 1501; [1956] 3 All E.R. 695n.		386
Mersey Docks and Harbour Board *v.* Coggins	[1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345		55
Mersey Docks and Harbour Board *v.* Coggins and Griffiths (Liverpool) Ltd.	[1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345	*Appl.*	143, 148
Mezger *v.* Mezger	[1937] P. 19; 53 T.L.R. 18; [1936] 3 All E.R. 130	*Appl.* *C.*	238, 253 255, 263–266, 276, 277, 282, 294, 296
Middleton *v.* Janverin	2 Hag.Con. 437	*R.*	317, 329
Millie, The	[1940] P. 1	*R.*	60
Mines *v.* Mines	[1957] 1 W.L.R. 628		353
Mordue *v.* Palmer	L.R. 6 Ch. 22		86
Mortimer *v.* Mortimer	2 Hag.Con. 310	*R.*	371
Mosey *v.* Mosey and Barker	[1956] P. 26; [1955] 2 All E.R. 391	*R.*	127, 135
Moss *v.* Moss	[1956] P. 373; [1956] 1 All E.R. 291	*Appl.*	102, 113, 118
National Assistance Board *v.* Parkes	[1955] 1 Q.B. 486; [1955] 1 All E.R. 700; [1955] 2 Q.B. 506; [1955] 3 All E.R. 1	*C.*	168, 172, 173
National Assistance Board *v.* Prisk	[1954] 1 W.L.R. 443; [1954] 1 All E.R. 400	*C.*	168, 172, 173
National Assistance Board *v.* Wilkinson	[1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255	*R.*	172
National Bank of Wales Ltd., *In re*	[1899] 2 Ch. 629; 15 T.L.R. 88		227
Nicholson *v.* Nicholson	L.R. 3 P. & M. 53	*R.*	373
New Brunswick Railway Co. *v.* British and French Trust Corporation	[1939] A.C. 1; [1938] 4 All E.R. 747	*R.*	216, 217
Norman *v.* Norman	[1908] P. 6; 24 T.L.R. 37		339
Northumbria, The	L.R. 3 A. & E. 6	*Appl.*	225, 231, 233
Nouvion *v.* Freeman	15 App.Cas. 1		220
P. *v.* J.	[1953] P. 186; [1952] 2 All E.R. 1129		169
Page *v.* Page	[1953] Ch. 320; [1953] 1 All E.R. 626		350
Paolantonio *v.* Paolantonio	[1950] W.N. 355; 66 T.L.R. (Pt. 2) 235; [1950] 2 All E.R. 404		387
Paquine *v.* Snary	[1909] 1 K.B. 688; 25 T.L.R. 212		109
Pastre *v.* Pastre	[1930] P. 80; 46 T.L.R. 175	*Dist.*	255, 264, 282, 294, 295
Penhas (Isaac) *v.* Tan Soo Eng	[1953] A.C. 304	*R.*	328, 329
Perks *v.* Perks	[1946] P. 1; [1945] 2 All E.R. 580	*Appl.*	357, 363, 364
Pertreis *v.* Tondear	1 Hag.Con. 136		304

Pickett *v.* Pickett	[1951] P. 267; [1951] 1 T.L.R. 585; [1951] 1 All E.R. 614	*R.*	381
Piers *v.* Piers	2 H.L.C. 331	*R.*	305
Pilcher *v.* Pilcher (No. 2)	[1956] 1 W.L.R. 298; [1956] 1 All E.R. 463		12
Pilinski *v.* Pilinska	[1955] 1 W.L.R. 329; [1955] 1 All E.R. 631	*R.*	313, 314, 329
Plumer *v.* Plumer and Bygrave	4 Sw. & Tr. 257; Searle & Smith 147	*C.*	334, 341
Plunkett *v.* Plunkett	[1937] P. 208; 53 T.L.R. 967; [1937] 3 All E.R. 736		260
Polartank, The	82 Ll.L.Rep. 108	*R.*	148
Polemis and Furness Withy & Co., *In re*	[1921] 3 K.B. 560; 37 T.L.R. 940	*R.*	97
Pollard, *In re*, *Ex p.* Pollard	[1903] 2 K.B. 41	*Dist.*	68, 73, 75
Pratt *v.* Inman	43 Ch.D. 175; 6 T.L.R. 91	*R.*	74
Pratt *v.* Pratt	[1927] W.N. 140; 43 T.L.R. 523	*R.*	30
Pratt *v.* Pratt	[1939] A.C. 417; 55 T.L.R. 910; [1939] 3 All E.R. 437	*R.*	209
President Van Buren, The	16 Asp.M.C. 444		54
Prest *v.* Prest	[1950] P. 63; 65 T.L.R. 729; [1949] 2 All E.R. 790		260
Pryor *v.* City Offices Co.	10 Q.B.D. 504	*R.*	162
Pryor *v.* City Offices Co.	10 Q.B.D. 504	*R.*	383
Purton *v.* Purton and George	[1957] 1 W.L.R. 216; [1956] 3 All E.R. 952		370
Ramsey *v.* Ramsey	[1956] 1 W.L.R. 542; [1956] 2 All E.R. 165		176
Read *v.* Read	[1942] P. 87; 58 T.L.R. 160; [1942] 1 All E.R. 226		387
Redfern *v.* Redfern	[1891] P. 139; 7 T.L.R. 157	*Appl.*	175, 177, 178
Redpath *v.* Redpath and Milligan	[1950] 1 All E.R. 600	*R.*	82
Reed *v.* Gray	[1952] Ch. 337; [1952] 1 T.L.R. 114; [1952] 1 All E.R. 241		352
Reg. *v.* Brimilow	9 C. & P. 366		79
Reg. *v.* Hutchings	6 Q.B.D. 300		219
Reg. *v.* Millis	10 Cl. & Fin. 534	*R.*	326
Reg. *v.* Miskin Lower, Glamorganshire, Justices. *Ex p.* Young	[1953] 1 Q.B. 533; [1953] 1 All E.R. 495	*E.*	9, 14–16, 18
Reg. *v.* Phillips	8 C. & P. 736		79
Reg. *v.* Pratt	L.R. 5 Q.B. 176	*Appl.*	188, 190
Reg. *v.* Staff Sub-Committee of London County Council's Education Committee	Judgments of the Court of Appeal, 1956, No. 60	*R.*	111
Reg. *v.* Waite	[1892] 2 Q.B. 600; 8 T.L.R. 782	*R.*	82

Reg. *v.* Williams	[1893] 1 Q.B. 320; 9 T.L.R. 198	*R.*	82
Reigate *v.* Union Manufacturing Co. (Ramsbottom) Ltd.	[1918] 1 K.B. 592	*R.*	343
Rex *v.* Brampton Inhabitants	10 East 282	*R.*	326
Rex *v.* Harling	[1938] 1 All E.R. 307; 26 Cr.App. R. 127	*R.*	82
Richards *v.* Richards and Flockton	[1942] P. 68n.; 58 T.L.R. 142n.	*R.*	126–128
Riches *v.* Westminster Bank Ltd.	[1947] A.C. 390; 63 T.L.R. 211; [1947] 1 All E.R. 469	*Appl.*	225, 230–233, 236
Rimmer *v.* Rimmer	[1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863		105
Robins *v.* National Trust	[1927] A.C. 515; 43 T.L.R. 243		303
Robins *v.* Robins	[1907] 2 K.B. 13; 23 T.L.R. 428		220
Rolph *v.* Marston Valley Brick Co. Ltd.	[1956] 2 Q.B. 18; [1956] 2 All E.R. 50	*C.*	349, 354, 355
Rose *v.* Rose	8 P.D. 98	*F.*	334, 342
Rowley *v.* Rowley	3 Sw. & Tr. 338; L.R. 1 Sc. & D. 63	*F.*	334, 341, 342
Ruding *v.* Smith	2 Hag.Con. 371	*C.*	302, 311, 312, 321–325, 327, 329, 331, 332
Russell *v.* Russell	[1935] P. 39; 51 T.L.R. 173	*C.*	334, 341, 343, 344. 348
Ruther *v.* Ruther	[1903] 2 K.B. 270	*R.*	14, 15, 17, 18
Ruther *v.* Ruther	[1903] 2 K.B. 270	*R.*	369
S. *v.* S. (orse. C.)	[1956] P. 1; [1954] 3 All E.R. 736	*Dist.*	139, 142
Sastry Velaider Aronegary *v.* Sembecutty Vaigalie	6 App.Cas. 364	*R.*	305
Satanita, The	[1897] A.C. 59; 13 T.L.R. 58	*Dist.*	52, 62–64
Savenis *v.* Savenis and Szmeck	[1950] S.A.S.R. 309	*Appl.*	302, 313, 314, 327, 328, 331
Scott *v.* Scott	[1952] W.N. 522; [1952] 2 T.L.R. 786; [1952] 2 All E.R. 890		124
Scrimshire *v.* Scrimshire	2 Hag.Con. 395	*C.*	302, 317, 325, 326, 329, 330
Seddon *v.* Seddon and Doyle	30 L.J.P.M. & A. 12	*R.*	346
Self *v.* Self	[1954] P. 480; [1954] 2 All E.R. 550	*R.*	354
Sethia (K. C.) (1944) Ltd. *v.* Partabmull Rameshwar	[1950] 1 All E.R. 51; [1950] W.N. 5	*R.*	344
Shelley *v.* Shelley (No. 2)	[1952] P. 111; [1951] 2 T.L.R. 1224; [1952] 1 All E.R. 70, 72	*E.*	192
Sheppard, *In re*	[1904] 1 Ch. 456		303
Sievwright *v.* Sievwright	[1956] 1 W.L.R. 1452		130
Simpson *v.* Executors of Bonner Maurice	14 T.C. 580		227

Smurthwaite *v.* Wilkins	11 C.B.N.S. 842		181
Smyth *v.* Smyth	[1956] P. 427; [1956] 2 All E.R. 476	*Appl.*	357, 363, 364
Socrates, The, and The Champion	[1923] P. 76	*Dist.*	144, 149
Spalenkova *v.* Spalenkova	[1954] P. 141; [1953] 2 All E.R. 880	*Dist.*	385, 393
Stanhope *v.* Stanhope	11 P.D. 103		122
Starkowski *v.* Attorney-General	[1954] A.C. 155; [1953] 2 All E.R. 1272		303
Stonedale No. 1, The	[1953] 1 W.L.R. 1241; [1953] 2 Lloyd's Rep. 319; [1954] P. 338; [1954] 2 All E.R. 170; [1956] A.C. 1; [1955] 2 All E.R. 689	*Appl.*	52, 58, 60, 64
Stopher *v.* National Assistance Board	[1955] 1 Q.B. 486; [1955] 1 All E.R. 700	*R.*	172
Sutherland & Co. *v.* Hannevig Brothers Ltd.	[1921] 1 K.B. 336; 37 T.L.R. 102	*R.*	92
Swift *v.* Swift	4 Hagg.Ecc. 139	*R.*	177
Taylor (formerly Kraupl) *v.* National Assistance Board	[1956] P. 470; [1956] 2 All E.R. 455	*Rev.*	102
Taylor *v.* Taylor	[1938] 1 K.B. 320; 53 T.L.R. 942; [1937] 3 All E.R. 571	*Appl.*	224, 234
Theocharides *v.* Joannou	[1955] 1 W.L.R. 296; [1955] 1 All E.R. 615	*R.*	356
Thomasset *v.* Thomasset	[1894] P. 295; 10 T.L.R. 591		130
Thompson *v.* Thompson	[1957] P. 19; [1957] 1 All E.R. 161		176
Thompson *v.* Thompson	[1956] P. 414; [1956] 1 All E.R. 603	*C.*	385, 391, 392
Thorogood *v.* Thorogood	The Times, Oct. 20, 1955	*D.*	102, 114, 116
Travers *v.* Holley	[1953] P. 246; [1953] 2 All E.R. 794	*Dist.*	157, 161, 162, 166
Travers *v.* Holley	[1953] P. 246; [1953] 2 All E.R. 794	*Appl.*	238, 247–249, 251–254, 260
Travers *v.* Holley	[1953] P. 246; [1953] 2 All E.R. 794	*R.*	382
Trestain *v.* Trestain	[1950] P. 198; 66 T.L.R. (Pt. 1) 621; [1950] 1 All E.R. 618n.		269
Tunstall *v.* Tunstall	[1953] 1 W.L.R. 770; [1953] 2 All E.R. 310		105
Udny *v.* Udny	L.R. 1 Sc. & D. 441		379
Vanderbilt *v.* Vanderbilt	1956, 1 N.Y., 2d., 342; 352 U.S. 820	*R.*	284, 286–289, 292, 300
Vine *v.* National Dock Labour Board	[1957] 2 W.L.R. 106; [1956] 3 All E.R. 939	*R.*	111

Virginia Carolina Chemical Co. *v.* Norfolk and North America Steam Shipping Co.	[1912] 1 K.B. 229; 28 T.L.R. 85	*R.*	61
Volkers *v.* Volkers	[1935] P. 33; 51 T.L.R. 87		378
Waldegrave Peerage Case	4 Cl. & Fin. 649		303
Wall *v.* Wall	[1950] P. 112; 65 T.L.R. 731; [1949] 2 All E.R. 927	*R.*	391
Waller *v.* Waller	[1956] P. 300; [1956] 2 All E.R. 234		170
Walls (J.) Ltd. *v.* Legge	[1923] 2 K.B. 240		109
Walter Grieve, Son & Co. *v.* König & Co.	7 Rettie 521	*R.*	184
Warden *v.* Warden	1951 S.L.T. 406	*N.F.*	238, 248
Warrender *v.* Warrender	2 Cl. & Fin. 488		303
Waterhouse *v.* Waterhouse	[1893] P. 284	*R.*	128
Watson *v.* Watson	[1954] P. 48; [1953] 2 All E.R. 1013	*R.*	217
Welton *v.* Welton	[1927] P. 162; 43 T.L.R. 174	*C.*	168, 173
Williams *v.* North Carolina	317 U.S. 287		270
Williams *v.* Williams	[1929] P. 114; 45 T.L.R. 157		109
Williams *v.* Williams	[1943] 2 All E.R. 746	*F.*	202, 208
Wilson *v.* Wilson	L.R. 2 P. & M. 435		245
Winans *v.* Attorney-General	[1904] A.C. 287; 20 T.L.R. 510		379
Winnan *v.* Winnan	[1949] P. 174; 65 T.L.R. 22; [1948] 2 All E.R. 862	*Appl.*	20, 32, 36–39, 45, 46
Wolfenden *v.* Wolfenden	[1946] P. 61; 62 T.L.R. 10; [1945] 2 All E.R. 539	*R.*	328, 329
Wood *v.* Wood	[1949] W.N. 59		195
Wood *v.* Wood	[1949] W.N. 59	*R.*	265, 282, 283, 292
Woodland *v.* Woodland	[1928] P. 169; 44 T.L.R. 495		216
Young *v.* Young and Kohler	[1955] 1 W.L.R. 395; [1955] 1 All E.R. 796	*R.*	354

STATUTES JUDICIALLY CONSIDERED

1869

Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 4 **Sachs J. 188**

1892

Foreign Marriage Act, 1892 (55 *&* 56 *Vict. c.* 23), *ss.* 1 *and* 22 **Karminski J. and C.A. 301**

1894

Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 466, 470 - **Divl.Ct. 84**

—— —— *s.* 503 - - - **Willmer J. 51**

1895

Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7 **Divl.Ct. and C.A. 254**

—— —— *ss.* 10 *and* 11 - - **Divl.Ct. 357**

1911

Maritime Conventions Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 1 - - **Willmer J. 143**

1914

Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 37 (1) - - **Collingwood J. 68**

1934

Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 (1) **Karminski J. and C.A. 120**

—— —— *s.* 3 (1) - **Lord Merriman P. 224**

1940

Allied Forces Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 51), *s.* 1 (1) - **Karminski J. and C.A. 301**

1947

Foreign Marriage Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 33), *s.* 2 - **Karminski J. and C.A. 301**

Polish Resettlement Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 19), *s.* 9 (2) (8) **Karminski J. and C.A. 301**

1948

National Assistance Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *ss.* 42, 43 - - **C.A. 168**

1949

Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *s.* 4 (3) - **C.A. 101**

1950

Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*b*) - **Willmer J. 202**

—— —— *s.* 4 - - - - **Sachs J. 333**

—— —— *s.* 4 (2) - - **Karminski J. 367**

—— —— *s.* 4 (2) (iv) - - **Willmer J. 193**

—— —— *ss.* 6, 18 (1) - - - **C.A. 156**

—— —— *ss.* 6, 18 (1) (*b*) - **Sachs J. 375**

—— —— *s.* 16 (1) (2) - - **Sachs J. 385**

—— —— *s.* 18 (1) (*a*) *and* (*b*) **Mr. Commr. Latey Q.C. 237**

—— —— *s.* 19 - - - - **C.A. 168**

—— —— *s.* 26 (1) - **Barnard J. and C.A. 213**

—— —— *s.* 26 (1) (3) **Karminski J. and C.A. 120**

1952

Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 169, 170 **Lord Merriman P. 224**

Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 87 - **Divl.Ct. 9**

1956

Administration of Justice Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 46), *s.* 1 (1) (*h*) **Willmer J. 179**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Legal Aid (Assessment of Resources) Regulations, 1950 (*S.I.* 1950, *No.* 1358), *reg.* 2 - - - - - **C.A. 101**

Legal Aid (General) (Amendment No. 1) *Regulations*, 1954 (*S.I.* 1954, *No.* 166) **C.A. 101**

Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940 (*L.* 27)), *r.* 9 (5) **Sachs J. 385**

—— —— *rr.* 16, 28 - - **Sachs J. 333**

—— —— *r.* 23 - - - - **C.A. 174**

—— —— *rr.* 27, 29 (1) **Barnard J. and C.A. 213**

R.S.C., Ord. 59, *r.* 29 - - - **Divl.Ct. 9**

CASES

DETERMINED BY THE

PROBATE, DIVORCE & ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

SCOTT *v.* SCOTT AND ANYAN.

[1955 D. No. 31.]

C. A.

1956
Nov. 22, 23.

Denning, Hodson and Morris L.JJ.

Husband and Wife — Adultery — Damages — Co-respondent's means — Materiality—Wife found to be moving spirit in adulterous liaison —Circumstances material for assessment of damages—Evidence as to co-respondent's means not receivable.

A wife, who was a good business woman and helped her husband in the running of a profitable public house, committed adultery and left the home. The husband was obliged to give up the public house, losing a considerable income thereby. On his petition for the dissolution of his marriage, evidence was given as to the means of the co-respondent. The commissioner found that the wife had been the moving spirit in the adulterous association with the co-respondent, and he awarded damages against the co-respondent. On appeal by the co-respondent against the quantum of damages:—

Held, that in considering the amount of damages due to a husband for the loss of his wife, though the general position and obligations of the parties were material, the court would not receive evidence as to the particular means or profits of the co-respondent, and that such evidence ought not to have been admitted.

Dicta of Sir Henry Duke P. in *Burne* v. *Burne and Helvoet* [1920] P. 17, 19 applied.

C. A.
1956

Scott
v.
Scott
and
Anyan.

Per Hodson and Morris L.JJ. Though a finding that a co-respondent has used his wealth or rank or position to seduce the respondent may be taken into account as an element increasing the damages, the converse of that proposition is not true, namely, that where the judge or tribunal finds that the wife was the moving spirit in the liaison the damages ought to be correspondingly reduced.

Appeal from Judge R. S. Shove, sitting as commissioner in divorce at Lincoln.

A husband and wife were married in February, 1945, when the husband (who had been previously married and divorced) was 40 and the wife 23. The husband's main activity was farming 150 acres in Lincolnshire; but after his second marriage, in September, 1953, he also took a public house at Sturton-by-Stow. The wife, who was a good business woman, helped him in that business. working in the bar and keeping the accounts.

Until 1948, as the commissioner found, the parties lived happily together, but thereafter the marriage began to deteriorate. There were quarrels, and on several occasions the wife packed her bags and threatened to leave. In 1953, in the course of her business in the public house, the wife met the co-respondent, a married man with two children, who was also a farmer, farming in partnership with his father and brothers three or four substantial farms of 300 to 400 acres each in Lincolnshire. In July, 1954, the wife and the co-respondent committed adultery together in a hotel at Cleethorpes. In October of that year she left her husband and was later traced to a room at one of the co-respondent's farms.

After his wife had left him the husband found that he could not keep on both the farm and the public house without her help; and in May, 1955, he gave up the public house. He brought a petition for the dissolution of his marriage on the ground of his wife's adultery with the co-respondent. The co-respondent's wife also started proceedings against her husband; and the two petitions were called on and heard together. The commissioner on June 27, 1956, granted decrees to both petitioners and awarded damages of £2,500 to the husband petitioner against the co-respondent.

The commissioner, in arriving at that estimate of the damages, indicated that the case was one which did not call for heavy damages for loss of consortium. Considering the evidence on the manner in which the wife had formed the relationship with the co-respondent, he said that, though it was the wife who " made "the running," nevertheless, if the co-respondent allowed himself to be enmeshed he had to take the consequences. The case was to be treated as one calling for damages mainly because of the business loss which the husband had suffered. The commissioner said: "It then comes down to a question of calculating a "final sum of money which on a purely business footing will "compensate the husband for the business loss of his wife; also "a sum as compensation of the loss of his wife as his wife. . . . "The damages have to be assessed having regard to all the many "contingencies which may happen in human affairs and all one "can do is to make the best estimate one can." The commissioner then estimated that the financial loss of income to the husband was £1,500 a year. That figure was incorrect on the face of the record, and the true figure for one year would have been more like £960.

Evidence was also given before the commissioner as to the means of the co-respondent, and it was stated that his total capital was £2,622, and his gross annual income £941.

The co-respondent appealed on the quantum of damages.

J. E. S. Simon Q.C. and *R. D. Lymbery* for the co-respondent. The damages awarded to the husband against the co-respondent were excessive, for the following reasons: First, the commissioner did not sufficiently take into account the fact that the marriage had been unhappy before the co-respondent came on the scene and that he was not therefore solely responsible for its breakdown. That is a factor for consideration under the first head of damages in divorce, namely, loss of the wife as a wife. Secondly, the commissioner found that it was the wife here who "made the "running." Just as damages are proportionately increased when a co-respondent uses his wealth or position to entice a wife, so they should be proportionately reduced where the wife is the moving spirit in a liaison; for again it is not the co-respondent's action alone which causes the damage suffered by the husband through the loss of his wife. Thirdly, the damages awarded were such that this co-respondent will be made bankrupt if he has to pay them. In *Burne* v. *Burne and Helvoet*,[1] the leading authority on this subject, Sir Henry Duke P. said that one of the matters for consideration was that an award of damages should not be such as to defeat its own object.[2]

---

[1] [1920] P. 17.

[2] Ibid. 19.

C. A.
1956

Scott
v.
Scott
and
Anyan.

[Hodson L.J. That may be a practical consideration, but I do not think that it is sound in law. It does not apply in running-down cases. This co-respondent is able to pay, even though the payment may break him.]

In *Butterworth* v. *Butterworth and Englefield, etc.*,[3] McCardie J. said[4] that the words of Sir Henry Duke P. in *Burne* v. *Burne and Helvoet*[5] were robust good sense. The courts have always acted on the well-established principle that damages should be attuned to the means of the parties. In *Greaves* v. *Greaves*[6] the Court of Appeal [Hodson J. (as he then was) being a member] held that the commissioner must have treated the damages as punitive and accordingly reduced the amount.

Fourthly, there was in this case a clear misdirection as to the evidence of the profits of the business, in that the commissioner took a period of 20 months and a figure of gross profits and treated them as a period of a year and net profits in estimating the direct business loss to this husband through the loss of his wife. That error is apparent on the face of the judgment and ought to be corrected by this court.

R. C. Vaughan Q.C. and *E. M. Ling Mallison* for the husband. The commissioner gave due weight to the evidence that this marriage was not entirely happy, and his decision should not be interfered with on that ground. Secondly, there is no principle known to the law which states that where adultery has taken place, and it is shown that the wife was the leading partner in the adulterous association, that is a reason for reducing the damages payable to the husband. The only damages which a husband can recover are compensatory and not punitive, and in estimating what the husband should recover by way of compensation it is irrelevant to consider which of the two wrongdoers was the prime mover in bringing on him the particular loss suffered.

With regard to consideration of the means of the co-respondent, though in *Butterworth* v. *Butterworth and Englefield, etc.*,[7] McCardie J. on February 10, 1920, cited Sir Henry Duke P. with approval, the same judge a few weeks later, in awarding damages of £250 to a petitioner in *Ewer* v. *Ewer and Charlton*,[8] said: "It "may be that the co-respondent will say he does not possess "£250. It matters not. The law rightly says that a man cannot "because he is poor escape from the effect of a wrong he has

---

[3] [1920] P. 126; 36 T.L.R. 265.
[4] [1920] P. 126, 157.
[5] [1920] P. 17, 19.
[6] [1948] W.N. 199; 92 S.J. 323 (C.A.).
[7] [1920] P. 126, 157.
[8] (1920) 36 T.L.R. 517.

"done."[9] The law on damages payable by a co-respondent was correctly stated in *Burne* v. *Burne and Helvoet*,[10] namely, that only general evidence as to the co-respondent's means should be considered and not evidence of his particular means or profits.

The mistake on the face of the record in assessing the business loss ought to have been pointed out to the commissioner at the hearing. *Greaves* v. *Greaves*[11] shows that this court will not interfere with an award of damages unless there has been some grave error of principle. No such error can be shown in the present case.

DENNING L.J. This is an appeal as to the amount of damages which a co-respondent should pay. [His Lordship stated the facts, and continued:] It is well settled in law that damages against a co-respondent are not to punish him for his wrongdoing, but are compensation to the husband for the loss of his wife and, in the case of a wife who was a good business woman, for the loss of her business capacity used in his interests. In the present case the wife was apparently a good business woman and very efficient —indeed, much more of a scholar (as the husband put it) than he was.

It is clear on the evidence that the husband and wife quarrelled in certain respects even before they took the public house, although the quarrels might have been less afterwards. Also it was said that the wife was in half a mood to leave her husband on one or two occasions before then, and that she had packed her bag. Whether that be so or not, it is a matter which clearly the judge took into consideration. He took into account the fact that this was not a case where the co-respondent was flaunting his wealth and seducing a woman in that way. It seems to me that in all respects save one the judge directed himself properly. He directed himself to the question what the loss of this wife was to the husband; but there is one respect in which it seems to me that he has been shown to be in error. It is based on the financial loss to the husband, because when his wife left him and went off with the co-respondent the husband found that he could not keep on both the farm and the public house, and he had to give up the public house, which he had been keeping largely with his wife's help.

[His Lordship stated the facts which gave rise to the commissioner's error in calculating the annual loss of profit on the public house, and continued:] It was said that the judge did not take into account sufficiently the co-respondent's means. It was said that a judgment for such a large sum of money would exhaust all the means of the co-respondent, and that in a case of this kind a court ought not to make an order which would have that effect. I do not agree. It is very doubtful whether logically it is quite justifiable to take an account of a co-respondent's means. As a matter of practical good sense, the general situation may be taken into account, but not specific figures.

---

[9] 36 T.L.R. 517.

[10] [1920] P. 17, 19.

[11] [1948] W.N. 199.

I see no error in the judge's judgment except in regard to that one misdirection as to the amount of the income. What, then, ought this court to do? Looking at it as best I can, it seems to me that to correct the error the sum of £2,500 should be reduced to the sum of £1,750. I think that the appeal should be allowed and judgment entered accordingly. I would allow the appeal to that extent.

Hodson L.J. I entirely agree with all that my Lord has said. I think that the judge's approach to this matter was quite impeccable, and that there was no misdirection at all. Unfortunately an error did creep in, with which I shall deal in a moment. First of all, it is said that the judge's approach to the case was wrong because he did not give full weight to the unhappiness which he found to have existed between the husband and the wife before the co-respondent came on the scene. On a careful reading of his judgment, I do not think that there is any substance at all in that criticism.

Secondly, it is said that there was a misdirection because he used this language: "If I may use a common and unjudicial "expression, it is the wife who makes the running; if the co-"respondent allows himself to be enmeshed, well, he has to take "the consequences." With regard to that I think the position is this, that if the court or the jury find in a given case that the co-respondent has used his wealth or rank or position to seduce the respondent, that may be taken into account as an element increasing the damages; but I do not think that the converse of that proposition is true—that is to say, that where the judge or tribunal finds that it is actually the wife who was the moving spirit in the liaison, the damages ought to be correspondingly reduced. If, as the judge found here, the co-respondent does not resist the temptation, he is justly to be described as causing the damage. I think there is no misdirection there.

It is further said by Mr. Simon, on behalf of the co-respondent, that as a matter of practical common sense the cases show that the court will take into consideration the ability of the co-respondent to pay damages. I do not think that that is strictly true. The history of these actions (which goes back to the action of criminal conversation) shows that the rank and fortune of the plaintiff or defendant, or petitioner and co-respondent, are material circumstances to be considered; but the authorities also show, I think, that, although the general position is to be considered, the court will not receive evidence of the particular means or profits of the co-respondent. It seems to me that the court would be driven into an absurd position if it spent time examining the prospective ability of the co-respondent to pay damages by an elaborate examination as to his means. It so happens that the co-respondent in this case is a prosperous Lincolnshire farmer, and so far as evidence was admitted (which I do not think it ought to have been) as to his means, it does not show that he was unable to pay the sum which the judge awarded.

In speaking of examination as to means of the co-respondent, I have in mind the language of Sir Henry Duke P. in *Burne* v. *Burne and Helvoet*,[1] in which he said that it was clear that he must not receive evidence of particular means or profits of the co-respondent. It is true that at the end of his judgment he said (and Mr. Simon drew our attention to this passage) [1]: "common-"sense tells me that I must bear in mind the general position and "obligations of the parties and make an award which it will be "possible for the co-respondent to meet and which will not defeat "its own object." I think that those passages from Sir Henry Duke's judgment have to be read in conjunction with one another against the background of the history of this kind of action. The only point on which this appeal turns is the point as to the accuracy of the information which the judge had as to the means of the petitioner which he derived from running a public house, where he had very great assistance from his wife, she being a more skilful business woman than he was a business man; and I think that he quite rightly laid emphasis on the question how much, from the business point of view, this man had lost from the loss of his wife. He does not seem to have thought that it was a case for heavy damages for loss of consortium; he regarded it as a case for damages because of the business loss that this man had suffered. [His Lordship then considered the error in calculating the business loss, and continued:] Neither side drew the attention of the judge to the correct facts and it was not his fault that he made the mistake which he did. Nevertheless, the mistake having been drawn to our attention, I think that the right course is to reduce the sum of damages so as to put that mistake right so far as we can; and I agree with the figure proposed by my Lord.

---

[1] [1920] P. 17, 19.

MORRIS L.J. I agree. It does not seem to me that the judge was in any way wrong in his approach to the problem which faced him; and, save in regard to one matter, it does not seem to me that the judge made any mistake.

Mr. Simon took four points on behalf of the co-respondent. He said, first, that there was a misdirection because the judge had suggested that the wife had " made the running," and that that matter should be visited on the co-respondent. It seems to me that when the judgment is read as a whole there is no wrong approach by the commissioner. He was merely saying that, even if the wife could be thought to have been encouraging to the co-respondent, there was nothing to exonerate him from the consequences of the course of conduct upon which he willingly embarked.

Secondly, Mr. Simon said that the judge did not give sufficient weight to the consideration that the marriage had at times been unhappy, or that there was some evidence of unhappiness. I do not find force in that submission. It seems to me that the judge had all the circumstances very fully in mind and was endeavouring to arrive at a right sum to compensate the husband. The judge said: " The damages have to be assessed having regard to all the " many contingencies which may happen in human affairs, and " all one can do is to make the best estimate one can."

Thirdly, Mr. Simon said that the judge had not paid proper regard to the evidence of the co-respondent's means. It seems to me that the task of the judge was to assess what was the proper compensation that the co-respondent should pay without being guided by any detailed evidence as to the ability of the co-respondent to pay some particular sum. I desire to express my concurrence with the way in which this topic has been dealt with by Hodson L.J. in his judgment.

The only other matter was the question of the figures. It does appear that through the mistake of both sides the judge had a wrong figure in his mind—a wrong figure that was not corrected. It is very easy to see how the mistake arose, and there is no need to criticize anybody in regard to it. It seems to me that the appropriate course, having regard to the fact that there was inadvertently a wrong figure, is for us to do the best we can to correct the position, and I agree with the proposed figure which should be substituted for that fixed by the judge.

Appeal allowed.
Award of damages reduced from £2,500 to £1,750.
No order as to costs.

Solicitors: *Field, Roscoe & Co. for Burton & Dyson, Gainsborough; Henry Gover & Son for Anthony T. Clark, Lincoln.*

M. M. H.

BOULTON *v.* BOULTON.

1956
July 16.

Lord Merriman P. and Collingwood J.

Husband and Wife—Maintenance—Justices—Enforcement of order—Appeal to Divisional Court—Procedure—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 87—*R.S.C., Ord.* 59, *r.* 29.

On a wife's appeal by notice of motion under rule 71 of the Matrimonial Causes Rules, 1950, to the Divisional Court of the Probate, Divorce and Admiralty Division from the dismissal by the justices of her complaint to enforce arrears of maintenance:—

Held, that since an order or determination of justices in regard to the enforcement of orders for maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949, is one made under the affiliation code the procedure on appeal from such an order is governed by the Magistrates' Courts Act, 1952, s. 87, and R.S.C., Ord. 59, r. 29, and not by section 11 of the Summary Jurisdiction (Married Women) Act, 1895, and rule 71 of the Matrimonial Causes Rules, 1950, and is, therefore, by way of case stated to the Divisional Court of the Probate, Divorce and Admiralty Division; R.S.C., Ord. 59, r. 29 (2), merely transferred the duty of hearing such appeals from the Queen's Bench Division to the Probate, Divorce and Admiralty Division without effecting any alteration in the procedure to be adopted.

Reg. v. *Miskin Lower, Glamorganshire, Justices. Ex parte Young* [1953] 1 Q.B. 533; [1953] 1 All E.R. 495 explained.

APPEAL from the Pirehill North justices.

On June 30, 1924, the Pirehill North justices made an order in favour of the wife on the ground of the husband's desertion, which was increased to the sum of £5 a week on September 6, 1954. Subsequently the husband was informed by the clerk to the justices, payments under the order being made to the court, that he was in credit to a substantial amount and he, thereafter, made no payments.

1956

BOULTON
v.
BOULTON.

On February 17, 1956, the justices dismissed the wife's complaint that the husband was £315 in arrear under the order. From this decision the wife appealed by notice of motion under rule 71 of the Matrimonial Causes Rules, 1950,[1] to the Divisional Court of the Probate, Divorce and Admiralty Division.

At the hearing of the appeal the preliminary point was taken on behalf of the husband that the proceedings, being proceedings for enforcement of an order, were governed by the Magistrates' Courts Act, 1952, s. 87,[2] and ought, therefore, to have been brought by way of case stated.

Ian Fife for the husband, on a preliminary point as to jurisdiction. This court has no jurisdiction to entertain an appeal from justices upon a complaint to enforce arrears of maintenance other than by way of case stated. [Halsbury's Laws of England, 3rd ed., vol. 12, pp. 508–509, and Rayden on Divorce, 6th ed., pp. 540–541, were referred to.] The present appeal is misconceived, since it has been made by way of a notice of motion under rule 71 of the Matrimonial Causes Rules, 1950, which is a form applicable only to appeals under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949. The payment of money under an order made by virtue of these Acts is, however, enforceable in the same way as an affiliation order (see sections 9 and 11 of the Act of 1895) and the procedure on appeal is that set out in section 87 of the Magistrates' Courts Act, 1952.

The first authority on the matter of appeals from the decision of justices on the enforcement of maintenance orders is *Ruther* v. *Ruther*,[3] in which it was held that such an appeal lay not to the Probate, Divorce and Admiralty Division but to the King's

---

[1] Matrimonial Causes Rules, 1950, r. 71: "(1) Every appeal under the "Summary Jurisdiction (Separation "and Maintenance) Acts, 1895 to "1949, against an order made, or "against the refusal of an order, "under those Acts shall be heard by "a Divisional Court of the Probate, "Divorce and Admiralty Division.

"(2) The appeal shall be by notice "of motion stating the grounds of "appeal and whether the whole or a "part only of the order is complained "of. . . ."

[2] Magistrates' Courts Act, 1952, s. 87: "(1) Any person who was a "party to any proceeding before a "magistrates' court or is aggrieved "by the conviction, order, determina-"tion or other proceeding of the "court may question the proceeding "on the ground that it is wrong in "law or is in excess of jurisdiction "by applying to the justices com-"posing the court to state a case for "the opinion of the High Court on "the question of law or jurisdiction "involved. . . .

"(2) An application under the pre-"ceding subsection shall be made "within fourteen days after the day "on which the decision of the magis-"trates' court was given. . . ."

[3] [1903] 2 K.B. 270.

Bench Division by way of case stated. In *Adams* v. *Adams*[4] an appeal from the refusal of a metropolitan magistrate to make an order in respect of arrears of maintenance was made to the Divisional Court of the Divorce Division. It was sought to distinguish *Ruther* v. *Ruther*[5] on the ground that that case applied only where an order had been made. The court, however, decided that it was bound by *Ruther* v. *Ruther*,[5] which applied as well to the refusal as to the making of such an order, and that it had no jurisdiction to hear the appeal.

The matter subsequently arose in *Reg.* v. *Miskin Lower, Glamorganshire, Justices. Ex parte Young*,[6] in which Lord Goddard C.J. in the Queen's Bench Divisional Court, again referring to the procedure as that of case stated, said that it was desirable that such matters should be heard in the Divorce Division. This statement was given effect in the Rules of the Supreme Court, No. 1 of 1953, by which R.S.C., Ord. 59, r. 29, was amended by the addition of subrule (2),[7] the effect of which was to transfer the jurisdiction to hear appeals from determinations of justices in regard to the enforcement of orders made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949, to the Divisional Court of the Divorce Division.

It is desired to emphasize that the subrule effected no alteration whatsoever in the procedure to be adopted, but merely altered the court in which the matter was to be heard, and it is to be noted that R.S.C., Ord. 59, r. 33 (*a*),[7] provides that where a case has been stated by justices under section 87 of the Magistrates' Courts Act, 1952, the appellant shall lodge it in the Principal Probate Registry if the appeal is to be heard by the Probate, Divorce and Admiralty Division. It is submitted, therefore, as beyond doubt, that the transference of such matters to the Divorce Division effected no change in procedure, which remains that of case stated, and that Matrimonial Causes Rules, 1950, r. 71, has no application to the present case. The proceedings have, therefore, been commenced upon an improper basis and this court has no jurisdiction to hear them.

---

[4] [1914] P. 155.

[5] [1903] 2 K.B. 270.

[6] [1953] 1 Q.B. 533; [1953] 1 All E.R. 495.

[7] R.S.C., Ord. 59, r. 29 (2): "Appeals against any order or determination by justices in regard to the enforcement of—(*a*) an order for the payment of money made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, (*b*) an order for the payment of money to a wife for her maintenance, or for her maintenance and that of any child or children of hers, which has been confirmed or registered in England or Wales under the Maintenance Orders (Facilities for Enforcement) Act, 1920, or the Maintenance Orders Act, 1950, shall be heard by a Divisional Court of the Probate, Divorce and Admiralty Division."

R. 33: "Where a case has been stated by justices under section 87 of the Magistrates' Courts Act, 1952, the appellant shall—(*a*) within ten days after receiving the case lodge it in the Crown Office and Associates' Department or in the Principal Probate Registry if the appeal falls to be heard by a Divisional Court of the Probate, Divorce and Admiralty Division. . . ."

P. L. W. Owen and *E. C. B. Hammond* for the wife. It is conceded that there is a distinction between an order for enforcement of payments of money under an order made in a court of summary jurisdiction in a matrimonial dispute and the order itself. According to *Ruther* v. *Ruther*[8] an appeal from the decision as to the enforcement of an order for payment of money to a wife was made by way of case stated to the Divisional Court of the Queen's Bench Division. It is, however, submitted that the effect of the recommendation of Lord Goddard C.J. in *Reg.* v. *Miskin Lower, Glamorganshire, Justices. Ex parte Young*,[9] as carried out by the amendment of R.S.C., Ord. 59, r. 29, was to transfer the hearing of such appeals to the Divisional Court of the Probate, Divorce and Admiralty Division, and to enable a party to proceed by the normal procedure on appeal applicable in that Division, namely, that of the Matrimonial Causes Rules, 1950, r. 71, in preference to proceeding by way of case stated. In *Pilcher* v. *Pilcher* (*No.* 2),[10] which was an appeal to this court by a husband against an order enforcing arrears of maintenance under an order in favour of the wife made in Gibraltar, the procedure adopted was that under rule 71 and no objection was raised as to the jurisdiction of the court.

Matrimonial Causes Rules, 1950, r. 71, governs every appeal under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949, against an order made or the refusal of an order "under those Acts." Although, as stated, it is conceded that the procedure on appeal from enforcement orders in general is not governed by this rule, it is submitted that in cases such as the present, the original order having clearly been made "under "those Acts," and the enforcement order, whether it is made or refused, being dependent upon the original order, it can be said that the enforcement order is made "under those Acts."

Counsel for the husband submits that rule 71 of the Matrimonial Causes Rules, 1950, applies to all matrimonial matters, and that includes subrule (5), which gives a right to extend time subject to the leave of the court. The question is whether the same consideration applies to an appeal to the Divisional Court of the Divorce Division on a matter of enforcement. It is conceded that R.S.C., Ord. 59, r. 33, appears to envisage that such appeals shall be by way of case stated, but rule 29 does not say that appeals can only be made by way of that procedure.

---

[8] [1903] 2 K.B. 270.

[9] [1953] 1 Q.B. 533.

[10] [1956] 1 W.L.R. 298; [1956] 1 All E.R. 463.

[LORD MERRIMAN P. During the adjournment I have had the opportunity of consulting Lord Goddard C.J. as to his statement in *Reg.* v. *Miskin Lower, Glamorganshire, Justices. Ex parte Young.*[11] His view was that this court was better able to deal with appeals from enforcement orders than the Divisional Court of the Queen's Bench Division, since it was more acquainted with the intricacies of such matters as cohabitation and condonation than that court.]

It is submitted that the strict time limit placed upon appeals by way of case stated is undesirable where questions such as the maintenance of a wife, which is a matter of public policy, are at stake.

Rule 29 (2) is ambiguous. The rule states that appeals from enforcement orders "shall be heard by a Divisional Court" of the Divorce Division, but it does not say how they shall be heard.

[LORD MERRIMAN P., referring to rule 29 (3): is a guardianship order also enforceable as an affiliation order?]

Yes, according to section 53 of the Children Act, 1948. In view of the harsh results which, as the present case shows, can flow if the procedure on appeal is only by way of case stated, and having regard particularly to the very restricted time limit under section 87 (2) of the Magistrates' Courts Act, 1952, it is submitted that, if rule 29 (2) is ambiguous, it should be construed in the wife's favour.

LORD MERRIMAN P. referred to the facts and to a certain obscurity as to the amount of the order, and continued: Manifestly, so far as the figures are concerned, a very serious issue is raised. But that is not the end of the difficulty, for on behalf of the husband, Mr. Fife, if he will allow me to say so, with very great clarity and force has raised the preliminary point that the whole of this appeal is misconceived. It is an ordinary appeal by notice of motion under the Matrimonial Causes Rules, 1950, rule 71 of which governs appeals to this court under the summary jurisdiction code dealing with matrimonial matters, and he submits that this is a misconception, because, although undoubtedly the appeal now lies to this court, it only lies by way

---

[11] [1953] 1 Q.B. 533.

1956

BOULTON v. BOULTON.

Lord Merriman P.

of case stated. The seriousness of that is that as this matter was disposed of on February 17, 1956, and as there is a statutory time limit in connexion with cases stated which expired 14 days after February 17, manifestly that is a very serious matter from the wife's point of view. However, the point must be faced.

Now, it is common ground that there has been a recent change in connexion with appeals against an enforcement order, and it is not disputed that it applies equally to the dismissal of an application as to the grant of an application in connexion with the enforcement of maintenance orders—(which I will call them shortly, without going into more details)—under the Summary Jurisdiction (Married Women) Act, 1895, as amended by various statutes down to and including the Act of 1949, and now, incidentally, the Magistrates' Courts Act, 1952, itself.

Until the case of *Reg.* v. *Miskin Lower, Glamorganshire, Justices. Ex parte Young* [1] appeals from any order concerning the enforcement of maintenance orders had to go by case stated to the Queen's Bench Division. That resulted from the case of *Ruther* v. *Ruther*,[2] which, to read one sentence only from the headnote, said [3]: " The decision of a court of summary jurisdiction upon " an information or complaint by a married woman alleging that " payments due to her from her husband under an order made " under the Act of 1895 "—that is, the Summary Jurisdiction (Married Women) Act, 1895, the foundation of the married women code—" are in arrear, is not a matter in respect of which an " appeal lies under section 11 of that Act to the Probate, Divorce " and Admiralty Division; but the court has power to state a " case for the opinion of the King's Bench Division upon a point " of law arising on the information." That was followed, with evident reluctance, by a Divisional Court of this Division in *Adams* v. *Adams*,[4] where, as far as one can judge from a very short report, the very procedure which has been adopted here was attempted, and was rejected for the reason that the King's Bench Division had already decided in *Ruther* v. *Ruther* [5] that the only method of testing the validity of an order for enforcement was by way of case stated to them.

The matter came up again in the case to which I have just referred (*Reg.* v. *Miskin Lower, Glamorganshire, Justices. Ex parte Young* [6]) and, without going into further detail of that case or into the reasoning of the judgment of Pearson J., which was the leading judgment on the point chiefly at issue in that case, at the conclusion of his judgment, agreeing with the judgment of Pearson J., Lord Goddard C.J. said [7]: " The proceedings in this " case took the form of an application for mandamus, but I have " no doubt that the matter could be raised by way of special case, " and I think that it would be most desirable if all appeals under " the Summary Jurisdiction Acts relating to separation and maintenance were brought to the Probate, Divorce and Admiralty " Division. In *Ruther* v. *Ruther* [8] it was held that a special " case arising out of an application to commit for arrears lay to " this Division and not to the Probate, Divorce and Admiralty " Division, but, if I may say so, the reasons given do not appear " to be wholly satisfactory, and evidently the Divisional Court " of the Probate, Divorce and Admiralty Division which heard " *Adams* v. *Adams* [9] did not regard the decision with favour." And then he added [10]: " If the practice could be changed by " rule or by an order of the Lord Chancellor under section 57 " of the Supreme Court of Judicature (Consolidation) Act, 1925, " it would, I think, be a desirable alteration." Now, of course, the allusion to section 57 is to the power of the Lord Chancellor to alter the distribution of business among Divisions which is laid down in the preceding section, and need not be further referred to.

---

[1] [1953] 1 Q.B. 533; [1953] 1 All E.R. 495.

[2] [1903] 2 K.B. 270.

[3] Ibid.

[4] [1914] P. 155.

[5] [1903] 2 K.B. 270.

[6] [1953] 1 Q.B. 533.

What was done was to adopt the rule-making procedure, and by the Rules of the Supreme Court, No. 1 of 1953, the rule-making authority added two new paragraphs to R.S.C., Ord. 59, r. 29. Subrule (1) of rule 29 was left as it stood, namely: " Subject as hereinafter provided, all appeals from a court of " quarter sessions or from justices by way of case stated and all " cases stated by a court of quarter sessions under section 11 of " the Quarter Sessions Act, 1849, shall be heard by a Divisional " Court of the Queen's Bench Division." That still stands, and it is worth noticing that the method of appeal by way of case stated is expressly mentioned. The two subrules which were added are as follows, so far as relevant: Subrule (2) reads: " Appeals against any order or determination by justices in regard " to the enforcement of—(*a*) an order for the payment of money " made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, (*b*) an order for payment of " money to a wife for her maintenance, or for her maintenance

---

[7] [1953] 1 Q.B. 533, 543.

[8] [1903] 2 K.B. 270.

[9] [1914] P. 155.

[10] [1953] 1 Q.B. 533, 543.

"and that of any child or children of hers, which has been "confirmed or registered in England or Wales under the Maintenance Orders (Facilities for Enforcement) Act, 1920, or the "Maintenance Orders Act, 1950, shall be heard by a Divisional "Court of the Probate, Divorce and Admiralty Division."

Now, I think that if I were under cross-examination as an ex officio member of the Supreme Court Rules Committee, and, if I remember rightly, the mouthpiece of that particular amendment, I should have said, I think without hesitation, that I thought we had quite obviously brought that procedure under the Matrimonial Causes Rules, 1950, r. 71 (1) and (2), and enabled ourselves to hear this appeal, duly put before us by notice of motion in the usual way.

But Mr. Fife has submitted, as I say, with great force, that that was not in the least what we were doing. What we were doing with regard to these cases stated under section 87 of the Magistrates' Courts Act, 1952, which, as he submits, is the only method of appeal provided in such cases, was to transfer to this Divisional Court the power of hearing, and, indeed, the duty of hearing such appeals by way of case stated, and relieving the Queen's Bench Division of deciding whether in any given case there has or has not been a resumption of cohabitation or has or has not been conduct conducing to the adultery, and the rest of it. It is a formidable argument, and it has the support of the learned editors not only of Stone's Justices' Manual[11] but also of the new edition of Halsbury,[12] under the title "Divorce: "Appeals from Magistrates' Courts."

It is right to point out, too, that there is nothing in the report which I have already quoted in the remarks of Lord Goddard C.J. in *Reg.* v. *Miskin Lower, Glamorganshire, Justices. Ex parte Young*[13] which suggests anything except the transfer itself. It does not say one way or the other whether the procedure by way of ordinary appeal, if I may so call it, by way of notice of motion, would be better or more convenient. There is no reference to that particular point at all.

It is also plain that there is no inherent difficulty in our dealing with the matter by way of case stated. It is not our usual method of procedure, but there is no reason why it should not be adopted, and it will work, as I see it, in this way: if this is not an appeal in the ordinary way from an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, then in terms rule 71 does not apply at all; if it does not apply, then the rules in the Annual Practice do apply, and there would be no difficulty in our following the procedure which is laid down in the Annual Practice; and I think one must recognize that the underlying point of the decision in *Ruther* v. *Ruther*[14] and those cases which have followed and approved it, with modified or restrained approval, do go on the basis that the order for enforcement is not one made under the Act of 1895 and the amending Acts at all, but is an order made under the affiliation code.

---

[11] 88th ed., p. 99, n. (*l*).

[12] 3rd ed., vol. 12, pp. 508–509.

[13] [1953] 1 Q.B. 533.

That brings me to one other point, which I must say I think, for what it is worth, tends in the direction of supporting the preliminary point. I have read R.S.C., Ord. 59, r. 29 (2), but subrule (3), I think, is not without importance. That reads: "If, before the hearing of any such appeal as is mentioned in "the last foregoing paragraph"—that is, an appeal against any order or determination by justices in regard to the enforcement of an order for the payment of money under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949—"there has been entered for hearing an appeal against an order "or determination by justices in regard to the enforcement of "an order made under subsection (2) of section 3 of the Guardian-"ship of Infants Act, 1925, and the parties to such appeal are "the same as the parties to the first mentioned appeal, a Divi-"sional Court of the Probate, Divorce and Admiralty Division "shall have jurisdiction to hear both appeals." Now, I am not suggesting that this is conclusive, but bearing in mind that an order for maintenance appended to a guardianship order is itself enforceable as an affiliation order, and, therefore, would in the ordinary course of things go on appeal by way of case stated to the Queen's Bench Division, the provision that, in the case of two concurrent appeals between the same husband and the same wife as regards the enforcement of a maintenance order proper and a guardianship order which includes maintenance, both shall be tried here, does suggest that the two things were regarded as being in the same category. Of course, again it would not be impossible to hear both the appeal and a guardianship appeal by way of case stated simultaneously, though different considerations, no doubt, would apply to the one appeal and to the other; but the difficulties would not be insuperable. Nevertheless, I think that that subrule does suggest that what was being dealt

---

[14] [1903] 2 K.B. 270.

1956

BOULTON
v.
BOULTON.

Lord
Merriman P.

with really was the transfer of appeals, by way of case stated, from the Queen's Bench Division to this court.

In conclusion, I merely wish to say this, that this type of preliminary point is to my mind the most distasteful type of decision which a judge has to give, and if I could have felt that we could rightly go the other way, and say that this appeal was in order, nobody would have been more delighted than I. And I go a step further: if the Court of Appeal think that transference of the appeal, as such, to this Division, enables us to apply our ordinary rules about how to deal with these appeals and to settle them by way of notice of motion and the rest of it, I should be happier still.

But for the moment I think I have no option but to say that this preliminary point succeeds.

COLLINGWOOD J. I agree, and in doing so I share the regret which has been expressed by the President.

This is a wife's appeal against the dismissal of her application to enforce a maintenance order, and on the authorities to which my Lord has referred, *Ruther* v. *Ruther*,[15] *Adams* v. *Adams*[16] and *Reg.* v. *Miskin Lower, Glamorganshire, Justices. Ex parte Young*,[17] it is clear that the right of appeal is not under section 11 of the Summary Jurisdiction (Married Women) Act, 1895, but that it comes under section 87 of the Magistrates' Courts Act, 1952; that is to say, that it is limited to the procedure of appeal by way of case stated, and it is limited to 14 days in respect of the time allowed for that appeal.

It is true that since 1953, when R.S.C., Ord. 59, r. 29, was amended, the necessity for bringing that matter before the Queen's Bench Division has ceased, and the appeal will now be dealt with in this Division; but, as the President has said, there is nothing in that rule which changes the method of appeal; all that is changed is the Division in which the appeal is heard.

I agree, therefore, that this preliminary objection succeeds.

Appeal dismissed.

Solicitors: *Rider, Heaton, Meredith & Mills for Bellyse & Eric Smith, Nantwich; Haslewood, Hare, Shirley Woolmer & Co. for Sproston, Slaney & Swann, Newcastle-under-Lyme.*

E. J.

---

[15] [1903] 2 K.B. 270.

[16] [1914] P. 155.

[17] [1953] 1 Q.B. 533.

THOMPSON *v.* THOMPSON.

C. A.

1956
Nov. 6, 7;
Dec. 11.

Denning, Hodson and Morris L.JJ.

Estoppel—Per rem judicatam—Husband and wife—Divorce—Petition by husband alleging perjury by wife in previous maintenance proceedings—Dismissal of wife's charge of cruelty in maintenance proceedings—Wife repeating charge of cruelty against husband in answer to his petition in divorce—Application to strike out allegations of cruelty—No estoppel binding the court in divorce jurisdiction.

Husband and Wife—Practice (in matrimonial causes)—Pleading—Rules to be observed.

The court in the exercise of its jurisdiction in divorce may recognize and apply the general doctrine of estoppel per rem judicatam in matrimonial proceedings; but the court is not to be bound by any such doctrine as might abrogate its statutory duty to inquire into the facts alleged and any countercharge made in matrimonial proceedings.

A wife who had left her husband issued a summons against him in the High Court under section 23 of the Matrimonial Causes Act, 1950,[1] alleging that he had been guilty of wilful neglect to provide reasonable maintenance for her. She alleged, inter alia, that he had treated her with cruelty, thereby causing her to leave the home. The husband denied cruelty and in turn alleged cruelty and desertion by the wife. After a full hearing the commissioner expressly rejected the wife's allegation of cruelty, held that she had not been justified in leaving her husband, and dismissed her summons.

Later the husband presented a petition for divorce in which he alleged cruelty by the wife and asserted, inter alia, that she had falsely and maliciously sworn in the maintenance proceedings that he had treated her with cruelty. By her answer the wife denied cruelty, and asked for a judicial separation on the ground of the husband's cruelty; and she repeated allegations and evidence rejected by the commissioner in the maintenance proceedings. The pleadings of both parties were prolix and offended many of the rules of pleading.

On an interlocutory appeal by the husband to strike out certain parts of the wife's answer (a) on the ground of estoppel per rem judicatam on the issue of cruelty; and (b) under R.S.C., Ord. 25, r. 4 and Ord. 19, r. 27[2]:—

---

[1] Matrimonial Causes Act, 1950, s. 23: "(1) Where a husband has "been guilty of wilful neglect to pro- "vide reasonable maintenance for "his wife or the infant children of "the marriage, the court, if it would "have jurisdiction to entertain pro- "ceedings by the wife for judicial "separation, may, on the application "of the wife, order the husband to "make to her such periodical pay- "ments as may be just; and the "order may be enforced in the same "manner as an order for alimony in "proceedings for judicial separation."

[2] Ord. 25, r. 4: "The Court or "a Judge may order any pleading to "be struck out on the ground that "it discloses no reasonable cause of "action or answer, and in any

Held, that no part of the wife's answer should be struck out on this application.

Per Denning and Morris L.JJ. Though, prima facie, the doctrine of estoppel per rem judicatam should apply to prevent this wife from repeating the charge of cruelty which had failed after full investigation in the previous proceedings, such estoppel did not bind the court, which ought in the divorce proceedings to investigate the charge afresh, having regard to the husband's charge of perjury against the wife in his petition.

Per Hodson and Morris L.JJ. The allegation of cruelty put forward by the wife in the divorce proceedings should not be struck out on the ground that she had previously failed to establish the same charge in the maintenance proceedings, for the subject of litigation was not the same in the two sets of proceedings.

Winnan v. *Winnan* [1949] P. 174; 65 T.L.R. 22; [1948] 2 All E.R. 862 and *Harriman* v. *Harriman* [1909] P. 123; 25 T.L.R. 291 applied.

Finney v. *Finney* (1868) L.R. 1 P. & M. 483 distinguished.

Bright v. *Bright* [1954] P. 270, 271; [1953] 2 All E.R. 939; *James* v. *James* [1948] 1 All E.R. 214, 217–218; and *Hudson* v. *Hudson* [1948] P. 292, 296; 64 T.L.R. 258; [1948] 1 All E.R. 773 considered.

Though the pleadings of both parties were open to strong criticism, the right course, in order to avoid further waste of time and public money, was that the case should be tried as soon as possible by the commissioner who had heard the maintenance proceedings.

Decision of Collingwood J. affirmed.

INTERLOCUTORY APPEAL from Collingwood J. in chambers.

The parties, George Walter Thompson and Beatrice Thompson, were married on October 6, 1945. The husband was a widower aged 49, and the wife a spinster aged 45. The husband had two children by his previous marriage, a son, Neville, aged 16½, and a girl, Janet, barely 11. They lived together until July 25, 1954, when the wife left the matrimonial home; and they never lived together thereafter.

On January 18, 1955, the wife made an application to the High Court for maintenance under section 23 of the Matrimonial Causes Act, 1950. She alleged that her husband had wilfully

---

"such case or in case of the "action or defence being shown by "the pleadings to be frivolous or "vexatious, the Court or a Judge may "order the action to be stayed or dis"missed, or judgment to be entered "accordingly, as may be just."

Ord. 19, r. 27: "The Court or a "Judge may at any stage of the pro"ceedings order to be struck out or "amended any matter in any indorse"ment or pleading which may be un"necessary or scandalous or which "may tend to prejudice, embarrass, "or delay the fair trial of the action; "and may in any such case, if they "or he shall think fit, order the costs "of the application to be paid as "between solicitor and client."

neglected to provide reasonable maintenance for her. Inasmuch as she had herself left the home, she had forfeited any right to maintenance unless she had good reason for leaving, and therefore she alleged in her affidavit "that the respondent since the "celebration of the said marriage has treated me with cruelty and has caused me by his conduct to leave the matrimonial home "aforesaid": and went on to allege one specific assault on July 25, 1954. The husband made an affidavit in reply in which he denied the wife's allegations and said: "Since the celebration "of the said marriage the applicant has treated me with cruelty "and she has now deserted me": and he went on to give his version of the incident on July 25, 1954, saying that the wife had assaulted him. The wife made an affidavit in reply giving more details about the incident, but making no other allegations.

On July 4, 1955, the summons for maintenance was heard before Mr. Commissioner Grazebrook Q.C. The wife went into the witness-box and proceeded to give a long and detailed history of the married life, bringing up many matters of complaint which had not been mentioned in her affidavit at all. The husband's counsel took objection, whereupon the commissioner ruled that the wife should give her evidence in chief "so that her case "could be finally elaborated and given in detail." She did this; and the commissioner then adjourned the hearing to give the husband an opportunity to meet the charges thus made against him. The case came on for hearing again on July 27, 28 and 29, 1955. The wife was cross-examined and re-examined. She called her sister and her sister's husband in support of her case. The husband gave evidence, calling his son and daughter and also a builder in support of his case. There was thus a full investigation into all the wife's charges against her husband. In the result, the commissioner found for the husband. He described the wife as "somewhat of a dragon" and her evidence as "totally unreliable and indeed quite untruthful in many "respects." He described the husband as a "quiet type of "man" who gave his evidence very fairly, and his son and daughter as a "very nice type" of lad and girl, who gave their evidence very well. He accepted their evidence. He held that "the applicant has not made out a case of cruelty and has "not made out a case justifying her in leaving her husband." Accordingly, he dismissed the application.

The commissioner did not make any finding whether the wife had been cruel to the husband, as it was unnecessary for him to do so. But in accepting the husband's evidence, he accepted the husband's version of the incident of July 25, 1954, according to which the wife for no sufficient reason started to punch at the husband's face, the husband caught hold of her wrists to stop her, whereupon she spat in his face, and he said: "That is the "end; I will see my solicitor in the morning." The husband was also asked: "Did you make any effort whatever to get her back? "(A) No. (Q) Do you want her back now? (A) I have no "objection at all. (Q) No objection at all? (A) None at all. "(Q) You told us earlier you do not love her? (A) Quite true."

The position was, therefore, that the wife on July 29, 1955, found herself separated from her husband with no claim on him for maintenance. From August to November, 1955, she made many efforts to return to him. Her solicitors wrote many times seeking a reconciliation. She wrote herself and she went herself to the home. But the husband refused to have her back. Eventually, on November 10, 1955, he filed a petition for divorce from her on the ground that she had treated him with cruelty. In April, 1956, she filed an answer denying cruelty, and seeking a judicial separation.

The pleadings stood thus: The petition filled seven and a half pages of foolscap. The answer filled 17 pages. In the petition the husband alleged in one sentence that the wife treated him with cruelty. He followed that by 19 paragraphs in which he gave many instances when he said his wife had "nagged" him and the children, and made unreasonable complaints. There was one long paragraph about the incident of July 25, 1954; then a paragraph alleging that she deserted him; then a paragraph alleging that she gave false and malicious evidence in the maintenance proceedings. The wife, by her answer, in the first 23 paragraphs denied the husband's charges in detail, and went on to give her version of what took place on the occasions mentioned by him. In the next paragraph, No. 24, she turned to the attack and charged him with cruelty. That covered five pages. In it she repeated all that she had said in the earlier paragraphs and went on to recite in great detail incidents that took place in the home, including the conduct of the children. In addition, she set out the full terms of all the correspondence in which she offered to return to the home.

The wife applied for further particulars of the petition. Her application filled five pages. The husband voluntarily gave one and a half pages of particulars. The wife then applied to the registrar for an order for further particulars, and he made an order for further particulars of 14 paragraphs of the petition. At the date of the present appeal they had not yet been delivered.

On those pleadings, the husband applied to the registrar to strike out those parts of the wife's countercharges relating to the alleged cruelty on the ground of estoppel per rem judicatam; to strike out other parts of the pleadings under R.S.C., Ord. 25, r. 4, or Ord. 19, r. 27, as being frivolous and vexatious, unnecessary, contrary to the rules of pleading, tending to prejudice, embarrass and delay the fair trial of the action, and as disclosing no reasonable cause of action. The registrar—Mr. Registrar Long—refused on June 28, 1956, to strike out any part of the wife's pleadings, and on appeal to Collingwood J. in chambers on July 23, 1956, the judge dismissed the husband's appeal.

The husband appealed to the Court of Appeal by leave of the judge.

Note. Mr. Robert Boyd who appeared for the husband on this appeal did not settle the petition criticized by the court in the judgments infra.

Robert Boyd for the husband. Collingwood J. appears to have decided that the issue before the commissioner was not the same as that raised on the divorce pleadings, because rule 56 of the Matrimonial Causes Rules, 1950 (S.I. 1950, No. 1940), which is concerned with applications under section 23 of the Act of 1950, sets out what must be in the applicant's affidavit and refers specifically to particulars of alleged wilful neglect and no more, and therefore thought that the only issue raised before the commissioner was the issue of wilful neglect and not cruelty. But the amendment to rule 56—paragraph 8A—added to that rule by the Matrimonial Causes (Amendment) Rules, 1954 (S.I. 1954, No. 138),[3] contemplates that there may be several subordinate issues on such an application. The commissioner found that at the date of the hearing before him the husband had not been guilty of cruelty, and the husband is entitled to rely on the finding of not guilty on that subordinate issue in the proceedings for wilful neglect, and to apply for the striking out of the wife's allegations of cruelty in her answer on the ground of estoppel per rem judicatam.

---

[3] "8A. Any party may apply to a "registrar for directions as to the "giving of discovery or particulars, "the filing of further affidavits and "any other matters necessary for "settling the issues to be determined "by the court and the evidence by "which they are to be proved."

C. A.
1956

THOMPSON
v.
THOMPSON.

The doctrine of estoppel per rem judicatam stated in *Hoystead* v. *Commissioner of Taxation* [4] applies to estop this wife from alleging cruelty in her answer, for cruelty was expressly in issue before the commissioner and that charge failed. Though it is conceded that on the authorities the strict rule of estoppel per rem judicatam may not apply in the Divorce Division, owing to the duty imposed on the court by statute to inquire into the charges properly before it, it is submitted that a charge which has already been dismissed is one which is not properly before the court and which ought accordingly to be struck out. If this husband is relieved from having to answer the charges of cruelty, these pleadings—and the subsequent trial, if any—will be considerably shortened and the costs correspondingly reduced. The course here adopted of applying in chambers to strike out parts of the pleadings was recommended as the most convenient method of procedure in such cases by Willmer J. in *Bright* v. *Bright*.[5]

[HODSON L.J. The court laid down in *Harriman* v. *Harriman* [6] that it is not to be fettered in its duty to ascertain the facts in a divorce suit.]

That is conceded; and Lord Merriman P. has pointed out several times, and particularly in *James* v. *James*,[7] that the decision in *Harriman* v. *Harriman* [8] applies as much to decisions of the High Court as to decisions of magistrates' courts. Nevertheless, in *Finney* v. *Finney*,[9] a decision which has stood for nearly 100 years, the court applied the doctrine of estoppel per rem judicatam to prevent a wife who had failed on a charge of cruelty in proceedings for judicial separation from repeating them in later proceedings for divorce; and in the recent decisions of *Dixon* v. *Dixon*,[10] *Hill* v. *Hill* [11] and *Bright* v. *Bright* [12] the doctrine has been held applicable in divorce proceedings where the same matters are in issue and the same legal quality has to be considered, even though the issue is not in terms the same. In *Dixon* v. *Dixon* [13] Davies J. refused to strike out pleadings in desertion proceedings only because of the paucity of specific findings in the cruelty proceedings; but that is not the position here, for the commissioner's findings on cruelty in the proceedings under section 23 are quite clear. In *Bright* v. *Bright*[14] Willmer J. held that the doctrine applied because the same issues were involved and it was sought to charge the husband with an offence of which he had already been found not guilty; and the judge drew a distinction between an estoppel as against a party charged with an offence and one as against a person putting forward a charge.[15] Though in *Hill* v. *Hill*[16] Davies J. described that as a "distinction without a difference,"[17] he held that the wife in *Hill* v. *Hill* was estopped from putting forward to defend herself charges on which she had previously failed. That is similar to the position in this case.

---

[4] [1926] A.C. 155, 170; 42 T.L.R. 207.

[5] [1954] P. 270, 278; [1953] 2 All E.R. 939.

[6] [1909] P. 123; 25 T.L.R. 291.

[7] [1948] 1 All E.R. 214, 216.

[8] [1909] P. 123.

[9] (1868) L.R. 1 P. & M. 483.

[10] [1953] P. 103; [1953] 1 All E.R. 910.

[11] [1954] P. 291; [1954] 1 All E.R. 491.

[12] [1954] P. 270.

[13] [1953] P. 103.

[MORRIS L.J. If in the present case the commissioner had found cruelty and made an order under section 23 in the wife's favour, could she later have petitioned for divorce on the ground of her husband's cruelty, and could the husband have defended the proceedings?]

On the authorities she could do so, and the husband would not be estopped, because when he is defending himself it is the statutory duty of the court to inquire into and hear his version in defence: in *Hudson* v. *Hudson*[18] a previous decision of the Divisional Court was held not to estop a party against whom a charge had been proved from defending himself in later proceedings.

The decision which presents an obstacle to the present submission is that of this court in *Winnan* v. *Winnan*[19]; the reasons for the court's refusal to apply the doctrine of estoppel per rem judicatam in that case are not clear, and it seems to be a case in which the court said that it would not be just to shut out the husband; but in so far as the reasons for the decision appear to have been (*a*) that the previous decision was a decision of justices, and (*b*) that the court had to infer what the justices had found, it is distinguishable from the present case. *Butler* v. *Butler*,[20] a decision which turns on the strict doctrine of estoppel, is relied on.

Whether the distinction to be drawn is between cases where the earlier decision was one of justices or in the High Court, or between a party attacking twice or defending twice, this husband is on the right side of both distinctions in asking that the doctrine shall apply in his case.

---

[14] [1954] P. 270.

[15] Ibid. 284.

[16] [1954] P. 291.

[17] Ibid. 301.

[18] [1948] P. 292; 64 T.L.R. 258; [1948] 1 All E.R. 773.

[19] [1949] P. 174; 65 T.L.R. 22; [1948] 2 All E.R. 862.

[20] [1894] P. 25; 10 T.L.R. 26.

C. A.
1956

THOMPSON
v.
THOMPSON.

If it is held that the strict rule of estoppel does not bind the court exercising its jurisdiction in divorce but that the divorce court has a discretion whether to apply it or not, then this is a case where the court's discretion should be exercised, because this wife is seeking to litigate the same matters on which she failed previously and this time she is doing so by way of attack.

[HODSON L.J. The Court of Appeal decisions seem to be against the strict doctrine of estoppel being applied: see *Kara* v. *Kara and Holman.*[21]]

The decisions can be reconciled if the divorce court has a discretion to exercise in relation to matters which would in ordinary litigation estop the parties.

Secondly, the court is asked to strike out certain parts of these pleadings under Ord. 25, r. 4, and under Ord. 19, r. 27, and also to strike out the whole of the pleadings with the exception of certain small paragraphs.

[DENNING L.J. It is an abuse of procedure for pleadings to put in all the evidence.]

Pleadings are always difficult when a party relies on a long continuous course of conduct; and in *Jamieson* v. *Jamieson*[22] the House of Lords said that it was improper to attack a pleading on the ground that particular paragraphs did not amount to much, for it was not until the evidence was called that one could see in what the cruelty consisted. But this wife would suffer no harm if her answer were reduced in size to a bare traverse of cruelty, an allegation of condonation and an assertion that the action was not presented in collusion.

Harold Morris for the wife. The wife's summons under section 23 was on the ground of the husband's wilful neglect to maintain. The judgment of Collingwood J. that procedure under section 23 is governed by rule 56, which requires in the applicant's affidavit particulars of the alleged wilful neglect and no more, is respectfully adopted here. Though the word "cruelty" was used frequently before the commissioner and in the wife's first affidavit, the issue before him was not cruelty but wilful neglect to maintain; and the fact that the commissioner heard evidence on the conduct of the parties did not make that conduct res judicata. The commissioner in refusing the wife's application, may have taken into account the possibility of a reconciliation, for he had heard the husband say that he was willing to take the wife back. And though the wife could not prove cruelty in proceedings for wilful neglect, it does not follow that in these proceedings she cannot prove cruelty proper. In *Jamieson* v. *Jamieson* [23] Lord Tucker pointed out the impossibility of creating categories of conduct amounting to cruelty.

---

[21] [1948] P. 287; 64 T.L.R. 329; [1948] 2 All E.R. 16.

[22] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.

[DENNING L.J. The House indicated that a charge of cruelty can only very rarely be struck out on pleadings because it depends so much on the particular circumstances, but some of their Lordships reserved the point and would not say that it could never be done.]

The husband has relied on the decision in *Bright* v. *Bright* [24] as authority for the proposition that estoppel applied because the previous proceedings were similar in substance to the present proceedings; but in *Bright* v. *Bright* [24] the previous proceedings contemplated an alteration in marital status, and that was not the case here. Moreover, the authority of *Bright* v. *Bright* [24] has been weakened by the criticism by Lord Merriman P. in *Cooper* v. *Cooper* (*No.* 2) [25] of Willmer J.'s observations. [*Lake* v. *Lake* [26] was also referred to.]

If the law on res judicata and estoppel is correctly stated in Halsbury's Laws of England (vol. 12, 3rd ed., p. 277, para. 533, and vol. 15, 3rd ed., p. 183, para. 356), the rule in matrimonial proceedings is that if a petitioner in the High Court fails and brings further proceedings he is estopped from reiterating in his subsequent petition the earlier charges which failed; but on grounds of public policy it is otherwise if a petitioner seeks to succeed on the ground that the respondent must fail because she is estopped from denying the charges by the finding of some other court, for that would abrogate the statutory duty of the divorce court to look at the matter afresh. Acts which would justify the court in making a finding of, for example, constructive desertion might be different from those justifying the court in making a finding of cruelty proper.

On the application to strike out under Ord. 25, r. 4, and Ord. 19, r. 27, though it is acknowledged that the pleadings are long, the wife's answer is reasonable in length, having regard to the nature of the petition, and will not cause such embarrassment as to require it to be struck out. Where a party is legally aided the pleader is always in difficulties. If the wife puts in a short affidavit—as this wife did—she has to meet allegations by counsel

---

[23] [1952] A.C. 525, 500.

[24] [1954] P. 270.

[25] [1955] P. 168, 176; [1954] 3 All E.R. 358.

[26] [1955] P. 336; [1955] 2 All E.R. 538.

C. A.
1956

THOMPSON
v.
THOMPSON.

for the husband that her answers ought to have been in the affidavit. If everything is put into her answer to the petition, it assists by cutting out requests for further and better particulars, and so shortens the proceedings.

[HODSON L.J. Why was it not sufficient simply to say in the answer: "Not guilty"?]

In view of the previous proceedings it is unlikely that that course would have saved time or costs. Some of the answer is by way of confession and avoidance. Though it is said that time and money is wasted by investigating these matters twice, once before the commissioner and once in the divorce court, it is established practice to go into such matters twice.

Boyd replied.

Cur. adv. vult.

Dec. 11. The following judgments were read.

DENNING L.J. said that the interlocutory appeal raised some important points of practice. His Lordship stated the facts as set out above, and said that the court was concerned with the pleadings in these proceedings, and particularly with the question whether the parties, having already fought for four days before the commissioner, should be allowed to fight the battle all over again. His Lordship described the pleadings, and said that at the date of the present appeal the further particulars asked for by the wife and ordered by the registrar had not yet been delivered, but that experience suggested that they would fill many pages. He continued: The husband has not yet applied for particulars of the wife's answer. He has taken a bolder course and applied to strike out a large part of it. The registrar and the judge have refused to strike out any part of the wife's answer. The husband appeals to this court.

The first ground of the application is estoppel by res judicata. The husband says that the wife's allegations of cruelty were all fought out in the maintenance proceedings; and that she is estopped from raising them again now. There is no doubt, to my mind, that if the doctrine of res judicata applies in its full force to the Divorce Division of the High Court, the wife is so estopped. The issue of cruelty has already been the subject of litigation by a court of competent jurisdiction, to wit, the court which tried the wife's claim for maintenance, and the court would not, according to the ordinary principles, permit her to open the same subject of litigation again: see *Hoystead* v. *Commissioner of Taxation.*[1] The question in this case is, however, whether those ordinary principles do apply to the Divorce Division. The answer is, I think, that they do apply, but subject to the important qualification that it is the statutory duty of the divorce court to inquire into the truth of a petition—and of any countercharge—which is properly before it, and no doctrine of estoppel by res judicata can abrogate that duty of the court. The situation has been neatly summarized by saying that in the divorce court "estoppels bind the parties but do not bind the "court": but this is perhaps a little too abbreviated. The full proposition is that, once an issue of a matrimonial offence has been litigated between the parties and decided by a competent court, neither party can claim as of right to reopen the issue and litigate it all over again if the other party objects (that is what is meant by saying that estoppels bind the parties): but the divorce court has the right, and indeed the duty in a proper case, to reopen the issue, or to allow either party to reopen it, despite the objection of the other party (that is what is meant by saying that estoppels do not bind the court). Whether the divorce court should reopen the issue depends on the circumstances. If the court is satisfied that there has already been a full and proper inquiry in the previous litigation, it will often hold that it is not necessary to hold another inquiry all over again: but if the court is not so satisfied, it has a right and a duty to inquire into it afresh. If the court does decide to reopen the matter, then there is no longer any estoppel on either party. Each can go into the matter afresh.

Such being the principles, let me show how they have been applied. The cases fall into three categories. The first category consists of those cases where a charge of a matrimonial offence has been established in previous proceedings. One party has been found guilty. In such a case, as between the parties, the strict rules of res judicata would seem to apply: but the divorce court, being bound by no estoppels, often allows a departure from them. The best illustration is where a party has obtained a decree of judicial separation on the ground of cruelty and follows it up with a petition for divorce on the same ground. In the subsequent divorce proceedings the court may treat the prior decree as sufficient proof of the cruelty: but it is not bound to do so. The court can, if it thinks fit, inquire into the charge of cruelty all over again. It will admit the prior decision as evidence of the cruelty, but not as conclusive. That was fully established in *Harriman* v. *Harriman*,[2] and it has since been given statutory force by section 6 of the Matrimonial Causes Act of 1937 and section 7 of the Matrimonial Causes Act of 1950. In cases in this category the practice of the court is this: When the previous proceedings have been in the High Court for judicial separation, the divorce court usually accepts the prior decision as sufficient proof: see *Bland* v. *Bland* [3]; but where the previous proceedings were before the magistrates for maintenance, the court usually thinks it right to inquire into the matter afresh, in which case it allows the accused party to defend himself for the second time: see *Pratt* v. *Pratt* [4] and *Hudson* v. *Hudson*.[5] In the present case the prior proceedings were in the High Court for maintenance. If the wife had succeeded in showing that her husband had treated her with cruelty, I should have thought that, if the wife subsequently brought divorce proceedings based on the self-same cruelty, the court would have inquired into the matter afresh. It would have allowed the husband to defend himself from the charge a second time, but it would give all proper weight to the previous decision.

---

[1] [1926] A.C. 155, 170; 42 T.L.R. 207.

The second category is where a charge of a matrimonial offence has been made unsuccessfully *in the High Court*. The charge has failed and the accused person has been acquitted. The complainant then repeats the charge in a subsequent suit for divorce. The court will not as a rule allow him to do this. The best illustration is where a wife petitions for judicial separation on the ground of cruelty, and fails. She afterwards petitions for divorce, alleging the self-same acts as cruelty. The doctrine of estoppel by res judicata applies so that she cannot claim as of right to litigate the matter all over again. The divorce court, being bound by no estoppels, is not bound to act on that estoppel. Nevertheless it will as a rule do so. The court thinks it unfair to put the husband to the burden of defending himself a second time on the same charge on which he has already been acquitted, especially when it is remembered that he will usually have had to bear the costs of the first suit. This was made clear in *Finney* v. *Finney*,[6] where Lord Penzance struck out the charges of cruelty. Another case in this category is *Bright* v. *Bright*,[7] where a wife petitioned for divorce on the ground of cruelty, and failed. She afterwards petitioned for divorce on the ground of constructive desertion, and in order to show that she had been driven out by his conduct she raised the very same allegations as she had previously raised in the cruelty proceedings; and in addition she made other allegations which could well have been raised as part of her case of cruelty. Willmer J. refused to allow her to raise those allegations. The third case is *Hill* v. *Hill*,[8] where a wife, who had left her husband, petitioned for divorce on the ground of cruelty. She failed. The husband then brought a petition for divorce on the ground of desertion. In her answer she said that she was justified in leaving him because of his conduct, relying on substantially the same allegation as she had made in her cruelty petition. She was seeking to make again a charge on which she had already failed. Davies J. refused to allow her to raise those allegations. In those three cases the court recognized the rule of estoppel by res judicata and did not think it right to depart from it. There is one case, however, where the court did allow a departure. It is *Dixon* v. *Dixon*,[9] where in previous proceedings a wife's petition for cruelty had been dismissed, and in subsequent proceedings she sought to charge her husband with constructive desertion based on substantially the same allegations. Davies J. allowed her to do it because the findings in the previous proceedings were not at all clear. In so doing I think he was exercising the right of the divorce court to reopen the matter if it should think fit so to do, because estoppels do not bind the divorce court.

---

[2] [1909] P. 123, 142, 144; 25 T.L.R. 291.

[3] (1866) L.R. 1 P. & M. 237.

[4] [1927] W.N. 140; 43 T.L.R. 523.

[5] [1948] P. 292; 64 T.L.R. 258; [1948] 1 All E.R. 773.

[6] (1868) L.R. 1 P. & M. 483.

[7] [1954] P. 270; [1953] 2 All E.R. 939.

In drawing the foregoing distinction between the first and second categories, I am following the guidance given by Lord Merriman P. in *James* v. *James* [10] and *Hudson* v. *Hudson*,[11] and by Willmer J. in *Bright* v. *Bright*.[12]

The third category is where a charge of a matrimonial offence has been made unsuccessfully *before the magistrates*, and the complainant afterwards repeats the charge in a subsequent suit for divorce. In such a case, as between the parties, the rules of estoppel would seem to apply: but the divorce court, which is bound by no estoppels, almost invariably investigates the charge afresh. The reason is because it is known that magistrates are inclined to concentrate more on the question: ought this husband to pay maintenance to the wife? and less on the other issues, however relevant they may be. At any rate, the divorce court does not consider it satisfactory to allow the matter to be conclusively determined by the magistrates. The divorce court regards their finding as evidence, but not as conclusive, on the issue. This is well shown by *Winnan* v. *Winnan*,[13] a decision of this court. It was a case where a wife kept 25 or 30 cats in the house, and this made life so intolerable for the husband that he left. The wife brought maintenance proceedings before the magistrates. In order to resist the claim, the husband put forward the facts about the cats—which amounted to a charge of constructive desertion—and he failed before the magistrates. They ordered him to pay maintenance. Subsequently he brought divorce proceedings against his wife based on the self-same facts as the constructive desertion. He was allowed to raise them all again and he succeeded, thus in effect contradicting the decision of the magistrates. The court was obviously influenced by the fact that the magistrates only decided "incidentally and by "inference" that the wife was not guilty of constructive desertion. The court felt itself therefore at liberty to depart from the strict rules of estoppel by res judicata. It is a good illustration of the principle that, while the divorce court recognizes estoppels by res judicata, it is not bound by such estoppels and can in a proper case depart from them.

---

[8] [1954] P. 291; [1954] 1 All E.R. 491.

[9] [1953] P. 103; [1953] 1 All E.R. 910.

[10] [1948] 1 All E.R. 214, 217, 218.

[11] [1948] P. 292, 296.

[12] [1954] P. 270, 271.

To come now to the present case, the question is whether the wife should be allowed to raise again in these proceedings the allegations of cruelty which were all thrashed out at great length in the maintenance proceedings before Mr. Commissioner Grazebrook. At first sight it would seem that she should not be allowed to do it. The court should, it would seem, act on the strict rule of estoppel by res judicata. If the wife had herself brought a petition for divorce on the ground of her husband's cruelty, I should have thought it plain that she should not be allowed to harass him again with the self-same charges on which she has already failed. The case would come within the second category. But the trouble in this case is with the husband's own petition. He has in his petition charged his wife with perjury in the prior maintenance proceedings. He has said that she falsely and maliciously swore that he treated her with cruelty and so forth. His charge of perjury is so comprehensive that, in order to investigate it, the court will have to go into her allegations all over again. He has set up this charge of perjury in order to revive any condoned cruelty. If he is bringing up the allegations in this way, I do not see why she should not be allowed to keep them in her answer. The court should allow a departure from a strict estoppel to enable her to do so. It is very unfortunate that all this expense should be had all over again, but he has brought it on his own head by his own pleading.

---

[13] [1949] P. 174; 65 T.L.R. 22; [1948] 2 All E.R. 862.

Apart from the question of estoppel by res judicata, the husband seeks to strike out many paragraphs of the answer, on the ground that they disclose no reasonable cause of action and are frivolous and vexatious; and are unnecessary and contrary to the rules of pleading and tend to prejudice, embarrass and delay the fair trial of the action. At first sight it seemed that we ought to accede to this application. The answer offends many of the rules of pleading. It includes a great deal of evidence, and a lot of matter which is irrelevant, and it is intolerably prolix. But the trouble is that the petition itself is nearly as bad. It almost invites an answer in kind. It is a case of the pot calling the kettle black. This was the view held both by the registrar and also by the judge. They both thought that the pleadings were a disgrace, but as the petitioner had brought it on himself they declined to strike out the answer.

In fairness to the wife's counsel, I should say how he came to plead at such length. He said that in the maintenance proceedings the wife was severely cross-examined on the familiar lines: "Why did not you put this in your affidavit?" To save her from another cross-examination on those lines her counsel on this occasion put into her answer everything that the wife wished to say when she went into the witness-box. The husband's counsel seems to have proceeded on the same lines. He put in everything the husband wished to complain about. So we find that these pleadings contain a full account of all the sources of friction which disturbed the calm of this household throughout the 10 years of marriage. Let me give an instance. The petition alleges in paragraph 9 "that during the years 1948 and "1949 whenever the petitioner's son visited the matrimonial "home on leave from the Army the respondent continually "nagged and complained of the extra work cast upon her and "made it clear that she wished the petitioner's son to leave the "matrimonial home." Just see what that comes to. It simply means that six years ago the wife made some complaints which the husband considered unreasonable. Is that cruelty, or is it not rather part of the wear and tear of married life? Some practitioners seem to think that whenever a wife objects or complains of anything her complaint has only to be described as "nagging" and it becomes cruelty. It almost makes me wish that the courts had never allowed "nagging" to be introduced as a head of cruelty. But, the allegation being introduced, see how the wife answers it. "She denies the allegation set forth "in paragraph 9 of the petition and says that the comforts of "the matrimonial home were always freely available to the said "Neville during the period of the said Neville's National Service. "She says further that during the 12 months when the said "Neville was stationed at Catterick he sent his washing home "for the respondent to do and that the respondent always did "the said Neville's laundry personally and returned the same to "him promptly. The respondent says further than when the "said Neville was stationed at Pirbright during a period of 10 "months he visited the matrimonial home every third or fourth "day and was warmly welcomed by the respondent." That is a bad piece of pleading. It was quite unnecessary for the wife to say how much kindness she showed to Neville. All that was needed was a denial of the charge of cruelty. To make matters worse, the wife repeats this paragraph as part of her charge of cruelty against the husband, which is ridiculous. Her kindness to Neville is not cruelty by the husband to her.

What is to be done with pleadings like this? At one time I was inclined to think that we ought to make both parties start all over again and plead properly. But that would involve a lot more time and money, and enough has been wasted already in all conscience. It would not matter so much if both parties were spending their own money, but the wife here is legally aided and is spending the country's money. It would be more excusable if the married life was being examined in court for the first time; but it has been already investigated for four days in court over the maintenance proceedings.

In all the circumstances, I think the right thing is to put a stop to all these interlocutory proceedings and bring the present case on for trial as soon as possible before the judge who tried the previous case, Mr. Commissioner Grazebrook. The husband must comply with the existing order for particulars to the best of his ability as briefly as possible, but then all interlocutory proceedings must stop. The wife will no doubt object to Mr. Commissioner Grazebrook trying the case because he has already described her as "somewhat of a dragon"; but it must be remembered that, if the divorce case had been started earlier, it would have been ordered to be tried at the same time as the maintenance proceedings or immediately afterwards. They would both have been tried by the same judge then. So they can both be tried by the same judge now. It is the only way to keep this litigation within reasonable limits of time and expense. It would be intolerable to expect another judge to have to listen for days to the trivial incidents of this married life when one judge has already done it. When the case comes before the same judge, both sides will realize that he knows all about them. He will need only to have his memory refreshed as to the previous proceedings and to be given evidence as to what has happened since. In this way much time and money will be saved.

This case shows how necessary it is for the rules of pleading to be observed. Perhaps I may be permitted to stress some points. Counsel for the petitioner should remember that to constitute cruelty the conduct complained of must be of a grave and weighty character. It is no good pleading trivial incidents which are only the ordinary wear and tear of married life or do no more than show that the parties are at arm's length. He should confine the pleading to substantial matters of complaint and give the time and place when they occurred. If he brings in a lot of trivial incidents, it weakens the force of substantial matters. The court will think that, if the petitioner complains of trivial things, it is because he is not ready to do his part in the give-and-take of married life. On the other hand, counsel for the respondent should remember that it is often bad policy to ask for further particulars of the cruelty alleged in the petition. The court takes no notice of general allegations of "cruelty" or "nagging" unless they are supported by specific instances, coupled with time and place. If the respondent asks for particulars he may force the petitioner to become specific on a matter which otherwise he would have left vague and useless to him. The respondent should also remember that in his answer he need only deny that he is guilty of cruelty. He need not go on to say what happened on the occasion in question. A wise maxim for every pleader is: "Do not leap before you come to the stile." Above all, neither side should plead evidence. They should confine themselves to the material facts. It is only in this way that pleadings can be kept within manageable bounds.

In the result, I think the appeal should be dismissed; but the case should be tried, as soon as possible, before Mr. Commissioner Grazebrook.

C. A.
1956

Thompson
v.
Thompson.

Hodson L.J. stated the facts and continued: The husband's attitude at the trial [before the commissioner] was that he was prepared to have his wife back, so that it was unnecessary to decide the case of cruelty raised by him. The only material question for the commissioner was whether the wife was justified in remaining away from her husband. This question having been decided adversely to the wife, the summons was dismissed.

The husband did not receive his wife back, but in his turn instituted proceedings against her by a petition dated November 10, 1955, on the ground of her cruelty to him. By her answer the wife denied cruelty and pleaded condonation. She also countercharged the husband with cruelty, which, if condoned, she said had been revived, inter alia, by the husband's refusal to live with her since the disposal of the previous proceedings instituted by her against him.

The husband seeks to strike out those parts of the wife's countercharges which have been dealt with in the previous proceedings on the ground of estoppel per rem judicatam.

In my judgment there is no estoppel here binding upon the court. The previous proceedings were not divorce proceedings, and in exercising divorce jurisdiction the court is not bound by the ordinary rules of estoppel. This has been recognized since the decision of *Harriman* v. *Harriman* [14] in the words of Sir Herbert Cozens-Hardy M.R.[15]: "The public interest does not "allow parties to obtain a divorce by consent, and the analogy "of ordinary actions cannot be applied": see the discussion as to the practical effect of this decision contained in the judgment of Lord Merriman P. in *Hudson* v. *Hudson* [16]: see also *Winnan* v. *Winnan.*[17] There a wife had obtained a maintenance order against her husband on the ground of his wilful neglect to maintain her. The husband subsequently petitioned for divorce on the ground (inter alia) of constructive desertion by the wife and succeeded on the very ground on which he had failed before the court of summary jurisdiction, namely, that by her conduct she had driven him from the home. It was held that though the justices must have decided that the wife was not guilty of constructive desertion, the husband was not estopped by their decision from petitioning for divorce on the ground of such desertion. The ratio decidendi of the court is stated in the headnote to be (1) that the rule of estoppel does not apply where proceedings in a court of summary jurisdiction are followed by proceedings in the divorce

[14] [1909] P. 123.

[15] Ibid. 131–132.

[16] [1948] P. 292, 296–301.

[17] [1949] P. 174.

court, and (2) that the subject-matter of the litigation was not the same in the two proceedings. So far as the first point is concerned, it has been argued that there is no such obstacle to the husband's claim to strike out in the present case because here the proceedings raising the estoppel are High Court proceedings, and not proceedings in a court of summary jurisdiction. I do not think that this is a distinction of substance. As Lord Merriman P. pointed out in *James* v. *James*,[18] *Harriman* v. *Harriman*[19] made it clear that no estoppel between the parties binds the court; but he continued[20]: "In my opinion that "decision does not depend on the fact that what was being put "forward as an estoppel in the High Court was a decision of a "court of summary jurisdiction."

I respectfully agree with those observations, and I cannot see any basis for distinguishing *Winnan* v. *Winnan*[21] from this case on the ground that there proceedings before a court of summary jurisdiction were concerned; whereas here proceedings of the same kind were instituted in the Division of the High Court which has divorce jurisdiction.

The second ground stated in *Winnan* v. *Winnan*,[21] namely, that the subject of the litigation is different in the two proceedings in question, seems to me to be applicable here. The court in its divorce jurisdiction has duties to perform in the public interest which are not paralleled in other litigation between parties, even when those parties are the same husband and wife who are subsequently engaged in divorce litigation. I think, therefore, that following that decision this court should not strike out the allegation of cruelty put forward by the wife in divorce proceedings, on the ground that she has previously failed to establish the same charges in the maintenance proceedings.

I have not overlooked the decision of Lord Penzance in *Finney* v. *Finney*,[22] which has been recognized as authoritative in this court, in which the previous proceedings raising the estoppel were proceedings for judicial separation, not divorce. The wife there sought to repeat in divorce proceedings charges of cruelty which she had previously made in proceedings for judicial separation and was held to be estopped from doing so. This decision is, in my opinion, consistent with what I have said, since proceedings for judicial separation are on the same footing for practical purposes as proceedings for divorce between the same parties.

[18] [1948] 1 All E.R. 214, 216.

[19] [1909] P. 123.

[20] [1948] 1 All E.R. 214, 216.

[21] [1949] P. 174.

[22] L.R. 1 P. & M. 483.

A decree of judicial separation affects status and the rights of property: see now sections 14 and 21 of the Matrimonial Causes Act, 1950. At the time when that case was decided the Matrimonial Causes Act, 1857, was in force, and in accordance with section 22 the court was guided by the principles and rules of the ecclesiastical courts in all proceedings for judicial separation.

It is to be noted that collusion was a bar to divorce a mensa et thoro (now called judicial separation): see *per* Lord Stowell in *Crewe* v. *Crewe*.[23] It is now a statutory bar also and has been since the passing of the Judicature (Consolidation) Act, 1925: see section 185 (1) of the Act. I therefore express no doubt as to the correctness of the decision of *Finney* v. *Finney*,[24] which was based on estoppel. See now, however, Matrimonial Causes Act, 1950, s. 7 (2), which replaces section 6 of the Matrimonial Causes Act, 1937, as to the duty of the court in divorce proceedings after a decree of judicial separation has been pronounced in favour of the party applying for divorce.

Bright v. *Bright* [25] and *Hill* v. *Hill* [26] were cases where there had been previous divorce proceedings in which judgment had been given against parties who were held to be estopped from again raising in later divorce proceedings issues which had been decided in the earlier divorce proceedings. In such cases there is no difficulty in applying the ordinary principles of estoppel. It has been argued that *Bright* v. *Bright* [27] assists the husband's argument to this extent, that it there was suggested by Willmer J. that in divorce proceedings a litigant can escape from being bound by estoppel when he is denying charges made against him but not when he is repeating allegations which have been the subject of previous proceedings and which have already been determined against him.

Then it is argued that this case can be distinguished from *Winnan's* case [28] because here the wife is seeking to do the latter, whereas the husband in *Winnan's* case [28] was putting forward charges for the first time by way of attack, having previously put forward and failed to establish these same charges by way of defence to his wife's claim. Therefore, it is said, *Winnan's* [28] freedom from estoppel is no justification for giving the wife in the present case the same liberty. She is attacking now as she was in the previous proceedings.

[23] (1800) 3 Hag.Ec. 123, 135.

[24] L.R. 1 P. & M. 483.

[25] [1954] P. 270.

[26] [1954] P. 291.

[27] [1954] P. 270.

[28] [1949] P. 174.

For my part, I think that whether the charges are used as a shield or a sword makes no difference, and I respectfully agree with the observations of Davies J. in *Hill* v. *Hill*.[29] For purposes of estoppel allegations put forward in answer to a petition or other claim still remain allegations just as much as if they had appeared in the original petition or claim. I do not draw any distinction between the two cases on the basis that in the earlier proceedings in one case allegations were made by a party seeking to obtain maintenance, whereas in the other the allegations were made in an attempt to resist maintenance.

I cannot, therefore, escape from the view that *Winnan* v. *Winnan*[30] is a binding authority on this court which should be followed, on the ground that there, as here, the subject-matter of the previous proceedings was different in that they were not divorce proceedings. Hence there is no estoppel which binds the court from investigating the charges made in the previous suit. In dealing with the decision of Willmer J. in *Bright* v. *Bright*,[31] I have not overlooked the observations of the Divisional Court in *Cooper* v. *Cooper* (*No.* 2),[32] which, however, do not touch the particular aspect of estoppel raised in this appeal.

The second ground of the application to strike out applies to a large number of paragraphs which, it is said, ought to be struck out under Ord. 25, r. 4, or Ord. 19, r. 27. The first comment made, namely, that many of the allegations could not possibly amount to cruelty, is perhaps best answered by saying that it is undesirable, if not impossible, by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty in cases where no physical violence is averred: see the speech of Lord Tucker in *Jamieson* v. *Jamieson*.[33]

It is true that the pleader has included a number of matters which on the face of them can be treated with contempt, but the same may be said of the husband's own pleading; and if the parties have included matters of no significance in support of their cases it may well be, as the registrar seems to have thought, that the very futility of these charges may recoil on their own heads and produce a result the opposite of that for which allegations of cruelty are prima facie designed.

---

[29] [1954] P. 291, 301.
[30] [1949] P. 174.
[31] [1954] P. 270.
[32] [1955] P. 168; [1954] 3 All E.R. 358.
[33] [1952] A.C. 525, 550; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.

I had thought at one time that several paragraphs of the answer might be struck out as embarrassing. Certainly many of them are unnecessary and drawn without any regard to the rules of pleading, which provide that facts, not evidence, are to be pleaded. For example, several paragraphs are devoted to a précis of correspondence passing between solicitors—obviously a waste of time, print and money. However, I cannot see that there is anything embarrassing to the petitioner in the answer, and I think that the petitioner by his own pleading has been at any rate partly responsible for bringing on himself a prolix and unimpressive answer. The court can protect itself to some extent against being inundated with words by pleadings such as these by visiting the defaulters so far as possible with the payment of the costs unnecessarily incurred.

I therefore see no reason to interfere with the judge's order in so far as the application is based upon the Rules of the Supreme Court.

I would dismiss the appeal and direct that the suit be heard before Mr. Commissioner Grazebrook.

MORRIS L.J. The issue which was raised by the wife's summons of January 18, 1955, was whether the husband had wilfully neglected to provide reasonable maintenance for her. The wife in her supporting affidavit sworn on January 17, 1955, said that her husband had treated her with cruelty which had caused her to leave the home on July 25, 1954. In an affidavit of March 2, 1955, the husband denied that he had treated her with cruelty. He said that his wife had treated him with cruelty and he said that she had deserted him on July 25, 1954.

The hearing of the wife's summons occupied the time of the court for some days in July, 1955. The summons was dismissed. The issue raised was whether the husband had wilfully neglected to provide reasonable maintenance. He said that he had maintained her until she deserted him. She said that she had not deserted him but that she had been forced to leave him because of his cruelty. These questions relating to her alleged desertion and his alleged cruelty became incidentally involved in the determination of the issue as to whether there had been wilful neglect to maintain. The contentions advanced by the wife in support of her allegations of cruelty were rejected by the commissioner. The husband's allegations of cruelty were not fully formulated and were not investigated.

C. A.
1956
Thompson
v.
Thompson.
Morris L.J.

After the dismissal of the wife's summons, the husband in November, 1955, presented a petition for dissolution on the ground of his wife's cruelty. As he had alleged cruelty in his affidavit of March, 1955, it seems a pity that he was not able to make up his mind whether he wished to present a petition so that if he did it could be heard at the time of the hearing of the wife's summons: so also the wife might have decided whether she wished to present a petition on the ground of her husband's cruelty. But it is clear that there is no bar to the presentation of the husband's petition. The wife is clearly entitled to defend herself against the charges of cruelty made against her. She goes further, however, and by her cross-prayer asks for a decree of judicial separation on the ground of her husband's cruelty: she says that he was cruel in the ways that she suggested during the hearing in July, 1955, although her suggestions were then dealt with and were rejected by the court. One question which arises is whether she is now precluded from presenting her cross-prayer.

By reason of the course adopted by the husband it is clear that his petition must be heard. When it is heard, the court must discharge its statutory duty of inquiry. The court will have to inquire so far as it reasonably can into the facts alleged and whether there has been any condonation. The court has a duty under section 4 (1) of the Matrimonial Causes Act, 1950, "to "inquire into any countercharge which is made against the "petitioner." These words by themselves cannot, however, require a court to inquire into a countercharge if the court has already inquired into it. But after inquiring into the husband's allegations, assuming that the court is satisfied that his petition has been proved, the court will not be bound to pronounce a decree in his favour and may dismiss his petition if in the opinion of the court he has been guilty of cruelty towards his wife or if he has been guilty in other ways set out in section 4 of the Act.

When the husband's petition is heard it seems clear that an investigation of the married life will have to be made. But can the wife actually prefer her countercharge? And need the court consider whether the husband was guilty of cruelty in any of the respects negatived in July, 1955? It is to be noted that on the hearing under section 23 the wife introduced the topic of her husband's cruelty in order to rebut his defence that she had left him, and accordingly that he had not wilfully failed to maintain her. But the "subject of litigation" was as to whether the husband had wilfully failed to maintain. The wife could not reopen that very issue and assert that for various reasons she had not put forward the full strength of her case. This is made clear by the well-known passage in *Hoystead* v. *Commissioner of Taxation.*[34]

But if in the maintenance proceedings the wife had succeeded, and if the decision had been that her husband had been cruel to her and had forced her to leave, and if later she had presented a petition for dissolution based on cruelty, she would have had to prove her case to the satisfaction of the court. Her husband would not, I think, have been debarred from defending himself if he could. But the previous decision could be relied on by the wife for its evidential value.

This is, I think, a consequence of the statutory obligations imposed on matrimonial courts. In ordinary litigation a party may be defeated by a plea of res judicata. If in a suit it can be shown that the precise dispute between the parties has already been adjudicated upon in an earlier suit between the same parties where the same dispute was also in issue as a basis for relief, there may be a successful plea of res judicata. But an estoppel may also arise even if in successive suits between the same parties the causes of action are different, if it can be plainly shown that a precise point was a direct issue in the first suit and was decided. These principles are, I think, of general application and may apply in matrimonial proceedings: but in matrimonial proceedings they cannot apply so as to absolve the court from duties statutorily imposed or so as to bring about any alteration of status not otherwise warranted and directed.

In *Harriman* v. *Harriman*,[35] Fletcher Moulton L.J.,[36] in his judgment, referred to section 31 of the Matrimonial Causes Act, 1857, which made relief dependent on the court being satisfied on the evidence that the case of the petitioner has been proved. He said[36]: " 'Proved ' here means proved as a fact, and not " merely proved inter partes. Hence no estoppels binding the " parties are necessarily sufficient to entitle a party to such relief. " The court is not bound to be satisfied of the necessary facts " because the one party is estopped as against the other from " denying them. Hence the production of a decree for a judicial " separation on the ground of cruelty is not as a matter of law " sufficient to make it the judicial duty of the court to accept as " a fact that the respondent has been guilty of such cruelty; " and if the circumstances under which the decree was obtained

[34] [1926] A.C. 155, 170.

[35] [1909] P. 123.

[36] Ibid. 142.

"are such as to raise a doubt in the mind of the court as to "whether the cruelty was in fact committed, it would be entitled "and bound to require such additional evidence as should be "sufficient to convince it of the fact. But although this is so, "the respect paid to a judicial determination of a fact between "parties (which in civil actions is evidenced by its creating a "binding estoppel) would, I should presume, in ordinary cases "lead the court to consider the fact of the cruelty to be ade"quately established by the production of the decree": see now section 7 of the Matrimonial Causes Act, 1950.

So, in *Hudson* v. *Hudson*,[37] Lord Merriman P. held that where a wife petitioned for dissolution on the ground of her husband's cruelty it would not be sufficient merely to rely on a determination of a court of summary jurisdiction, though upheld on appeal to the Divisional Court, that the husband had been guilty of cruelty. Lord Merriman held that it was competent for the husband to contest the wife's petition.

In *James* v. *James*,[38] Lord Merriman P. said[39]: "When it "is a question of seeking to oblige a court to decide something "contrary to its own belief on the facts because some other "court has decided in the affirmative, there is the consideration "that so to oblige the court would be running contrary to the "statutory duties imposed on the court, whereas where a party "who has already been defeated in bringing a claim for relief is "trying to do exactly the same thing again, the same considera"tion does not apply to prevent him from being estopped from "bringing that evidence before the court at all." I respectfully agree with this statement of the position. It seems to me that reason and authority alike show that the special directions and obligations imposed by statute on the matrimonial courts are not to be avoided merely because as between the parties themselves a plea of estoppel might otherwise be raised.

The reasons for this are apparent. Matrimonial courts which deal with the status of parties have jurisdiction which is to be exercised in strict conformity with the statutory codes enacted by Parliament. Respect for the law and other features of the public interest require that there should neither be side-stepping of the obligations of proving a charge which is preferred nor a denial of a right to prefer a new claim for relief if the subject of litigation differs from that in some previous proceedings.

---

[37] [1948] P. 292.

[38] [1948] 1 All E.R. 214.

[39] Ibid. 217.

But it seems to me that so long as the duties of the court are in no way impaired, there can be recognition of the principle of estoppel inter partes. On this basis, in *Finney* v. *Finney*,[40] in 1868, Lord Penzance held that where a wife, who had petitioned for judicial separation on the ground of her husband's cruelty and who had failed in her charges, subsequently petitioned for dissolution on the ground of her husband's adultery coupled with cruelty, the allegations of cruelty being the same as those previously preferred, her allegations of cruelty should be struck out. He said[41]: "In both suits the husband is "charged with the same matrimonial offence, that of cruelty. "That issue having been tried, and found in the husband's "favour in the former suit, the wife now seeks to have it tried "over again, and it is argued that she is entitled to reiterate "those identical charges, because she has tacked on to them a "charge of adultery. I think that cannot be allowed. According "to the practice of every court, after a matter has once been put "in issue and tried, and there has been a finding or a verdict on "that issue, and thereupon a judgment, such finding and judgment is conclusive between the same parties on that issue. "In all courts it would be treated as an estoppel."

In *Bright* v. *Bright*,[42] Willmer J.[43] indicated the limits of the application of the principle of estoppel when he pointed out that a petitioner cannot get relief in the divorce court merely by relying on a submission that the respondent is estopped from denying what is alleged. He said[43]: "In that case, the public "interest no doubt does intervene to see that relief is not "improperly obtained by a petitioner merely through some "technical rule. But it is quite another thing to say that a "petitioner, who is the party bringing the charges, is entitled to "persist in repeating allegations which have already been the "subject of previous proceedings, and which have already been "determined against him or her, merely to obtain relief for "himself or herself. In such circumstances, as I see it, no "interest of the public is infringed by saying that the petitioner "is estopped per rem judicatam from repeating allegations which "have previously been the subject of judicial determination."

How, then, does the matter stand in the present case? As I have said, I think that the wife must be allowed freely and fully to defend herself against the charges of cruelty made against her. These have never been investigated. But when she repeats the charges which she previously made it would seem on first approach to be unreasonable to require the court to traverse ground already covered. It may be that the plea of res judicata in its strict form cannot avail. The actual " res " on the hearing in July, 1955, was whether the husband had wilfully refused to maintain his wife: the " res " which she now presents is whether there should be a judicial separation because her husband was guilty of cruelty. But as to estoppel in its wider form it would seem that the wife's charges of cruelty were fully heard in July, 1955, and were the subject of judicial determination. The basis of this estoppel is perhaps expressed in the words: Nemo debet bis vexari pro una et eadem causa. Furthermore, the court will not allow its processes to be abused. These considerations might lead towards the view that a plea of estoppel should prevail; but the decision in *Winnan* v. *Winnan* [44] shows that the court exercises care to see that there is no impairment of the jurisdiction of the divorce court. In that case a wife obtained a maintenance order against her husband in a court of summary jurisdiction on the ground that he had wilfully neglected to provide reasonable maintenance for her although the husband had defended himself by alleging that his wife kept an intolerable number of cats in the house and had refused to get rid of them and so had made life impossible for him in the matrimonial home. Later the husband petitioned for dissolution and alleged that by what she had done his wife had constructively deserted him. It was held that there was no estoppel which precluded the husband from obtaining a decree. In that case the allegations of the husband were in the court of summary jurisdiction advanced by way of defence to allegations made by the wife, whereas in the divorce court his allegations were put forward substantively by him. But no point as to this was made in the judgments in this court. The case proceeded on the basis, as stated by Bucknill L.J., that the justices [45] " must have applied their minds to the " question whether the wife had been guilty of constructive " desertion and its legal effect on her claim for maintenance, and " that their order for maintenance proves that they decided that " the wife had not been guilty of constructive desertion." Later he said [46]: " Now, if the argument of res judicata put forward by " the wife in the present case is to prevail, the right given by

---

[40] L.R. 1 P. & M. 483.

[41] Ibid. 484.

[42] [1954] P. 270.

[43] Ibid. 284.

[44] [1949] P. 174.

[45] [1949] P. 174, 181.

[46] Ibid. 186.

"the Act of 1937 to the husband to a decree of divorce on the "ground of his wife's desertion will be of no value to him, "because the order of the justices against the husband incidentally, and by inference, also decided that his wife was not "in desertion at the time when the order was made. Can it be "said under those circumstances that the issue of the wife's "desertion, assumed to have been considered by the justices, "and the right of the husband to petition for a divorce on the "ground of her desertion, is the 'same subject of litigation' "within the definition of res judicata given by Wigram V.-C. in "*Henderson* v. *Henderson*[47]?" Another decision which illustrates that it is necessary carefully to examine whether the "subject of litigation" is the same in separate proceedings is *Cooper* v. *Cooper* (*No.* 2).[48] In his judgment Lord Merriman P. points out the limitations in the application of the principle of estoppel.

It might be said that in the present case, though the actual decision in July, 1955, was that the husband had not wilfully neglected to maintain his wife, that decision was founded on a further decision clearly made that the husband had not been guilty of cruelty. There is some force in the view that *Winnan* v. *Winnan*[49] might be distinguished. But on the whole I think that *Winnan's* case[49] applies in the present case. It must also be borne in mind that it is only in perfectly clear cases that a pleading should at this stage be struck out on the basis of an estoppel. Furthermore, the husband has in this case himself chosen to allege that his wife made false charges of cruelty in the previous proceedings. If he decides to put the matter in this way the wife must at least be entitled to defend herself. She must be entitled to endeavour to refute a charge that previously she "falsely and maliciously" swore that her husband had treated her with cruelty. It would be difficult at this stage to impose rigid limits upon the scope of her defence to this charge. I therefore think that the decision of the judge in this case should not be disturbed. But the justice of the case will, I think, be met if the hearing comes on before Mr. Commissioner Grazebrook.

In regard to the pleadings generally and in regard to the applications to strike out on the other grounds relied on I desire to express my concurrence with the observations made and the conclusions expressed by my Lord, Denning L.J.

---

[47] (1843) 3 Hare 100, 114, 115.

[48] [1955] P. 168.

[49] [1949] P. 174.

Appeal dismissed.
Order for trial of suit before Mr. Commissioner Grazebrook.
Respondent wife's costs of appeal to be her costs in cause.

Solicitors: *Leonard Kasler & Co.; Alec Woolf & Turk.*

M. M. H.

TANTALUS (MASTER AND CREW) v. TELEMACHUS, HER CARGO AND FREIGHT (OWNERS).

1956
Dec. 7.
Willmer J.

THE TELEMACHUS.

[1956 T. No. 1318.]

Shipping—Salvage—Personal award—Elements material—Tax element—Liability to taxation on award—Effect on award.
Damages—Tax element.

In a claim by the master and crew of a salving vessel for an award for salvage services rendered to a ship, her cargo and freight:—

Held, that having regard to the principles of public policy underlying the law of salvage, the same considerations with regard to the incidence of taxation as apply to an award of damages in favour of an injured plaintiff apply to an award of salvage in the case of a plaintiff who has performed personal services, and, accordingly, the incidence of taxation on any award made was an element to be taken into consideration in assessing such award.

British Transport Commission v. *Gourley* [1956] A.C. 185; [1955] 3 All E.R. 796 applied.

ACTION.

The master and crew of the *Tantalus* claimed salvage awards for services rendered to the *Telemachus*, her cargo and freight. Both vessels were in the same ownership. The *Telemachus*, soon after leaving the port of Semarang, anchored off the north coast of Java after her engines had broken down. Since it was impossible to carry out engine repairs at sea, the *Tantalus* proceeded from Djakarta and towed the *Telemachus* into the roadstead of

1956

THE TELEMACHUS.

Sourabaya. The value of the salved property was agreed at £677,440 and the value of the *Tantalus* was agreed at £465,000.

The master and crew of the *Tantalus* claimed awards of salvage. The owners of the *Telemachus*, her cargo and freight admitted that salvage services had been rendered.

J. B. Hewson for the salvors. Since both vessels are in the same ownership, only the master and crew of the salving vessel are claiming salvage. The owners of the salving vessel are not claiming against a sister ship and the owners of the cargo carried therein. It is admitted by the owners of the salved property that services in the nature of salvage were rendered. The services rendered were valuable services requiring great skill. The *Telemachus* was immobilized and required towage services. The master of the *Tantalus* accepted a very grave responsibility by risking his vessel when carrying out the very difficult task of navigating his vessel with the *Telemachus* in tow into the roadstead of Sourabaya. The crew of the *Tantalus* incurred some risk of personal injury while manhandling the cables, and throughout the service kept extra watches.

[WILLMER J. Will any members of the crew of the *Tantalus* be liable to pay tax on any award made?]

My instructions are that crews are liable to pay tax on salvage awards, and certainly the master and officers of the *Tantalus* would probably be liable to quite a high rate of taxation.

[WILLMER J. If a person who performs personal salvage services must pay tax on an award, is not that fact an element which must be taken into consideration in assessing the award? In view of what the House of Lords said in *British Transport Commission* v. *Gourley*,[1] could not the same principle as applied in that case be properly applied to a case involving personal services of salvage?]

There would appear to be no logical reason why the principle in *British Transport Commission* v. *Gourley*[1] should not apply to a quasi-contract such as salvage. That proposition is assented to on behalf of the salvors, although it is submitted that it would not be proper to approach the matter by way of exact calculation. For example, it would not be proper to double an award merely because a salvor pays 10s. tax in the pound. Taxation is one of many elements in the service to be considered.

R. F. Stone for the salved property. The incidence of taxation on a salvage award is an irrelevant consideration. Wholly different considerations applied in *British Transport Commission* v. *Gourley*.[1] Here the court is considering what is a fair remuneration for the work done, and the incidence of taxation on any award made should not be taken into consideration.

---

[1] [1956] A.C. 185; [1955] 3 All E.R. 796.

[Willmer J. Is not the underlying principle in the law of salvage that seamen must be encouraged by awards of salvage to render assistance to property? Surely there is no difference in taking into consideration the incidence of taxation from the long-established principle of taking into consideration "moneys "numbered"?]

In the present case "moneys numbered" have not been put forward. This service was carried out in favourable weather and the success of the operation was due to the co-operation between both masters and both crews. The radar on the *Telemachus* was used to assist in the navigation of the vessels. The *Agamemnon*, another sister ship, was also available to render assistance. The success of this operation depended on the efforts of the crew of the *Telemachus* as well as on those of the crew of the *Tantalus*, and an award should be made which is fair to both parties.

J. B. Hewson in reply. The question whether the incidence of taxation is to be taken into consideration must be looked at from the point of view of public policy. The law of salvage is a mixed question of private right and public policy: see Kennedy's Law of Civil Salvage, 3rd ed., pp. 7 and 8. In the interests of public policy the incidence of taxation on a salvage award should not be allowed to have the effect of discouraging seamen from rendering salvage services. Accordingly, it is submitted that the incidence of taxation is an element to be taken into consideration in assessing a personal award of salvage.

A nautical assessor sat with the judge.

Willmer J. stated the facts and continued: I have to arrive at such an award as will fairly compensate the master and crew of the salving vessel, without injustice to the salved interests, and such an award as will, in the interests of public policy, encourage other mariners in like circumstances to perform like services. That, I think, is the underlying principle upon which all awards of salvage must be based.

There is, however, I think, one other matter to be taken into consideration, more especially when one is dealing with personal awards of this character, and that is this. Certainly the master

---

[1] [1956] A.C. 185.

BIBL. LONDIN UNIV.

of the *Tantalus*, and, I apprehend, in all probability, all the officers of the *Tantalus*, and, I daresay, all the European members of her crew, will become liable to taxation, as part of their earnings, upon such share of my award as they receive. I raised the question in argument whether that is an element which ought to be taken into consideration, and I raised that point more particularly having regard to the recent decision of the House of Lords in *British Transport Commission* v. *Gourley*.[1] It appears to me that in principle the same considerations as apply to an award of damages in favour of an injured plaintiff should properly also apply to an award of salvage in the case of a plaintiff who has performed personal services. More particularly I think is that so when one pays regard to the principles of public policy underlying the law relating to salvage awards. In modern conditions it seems to me that it would be quite unreal, when one is dealing with personal services, to ignore the possible effect of taxation upon the amount of the salvage award. If one were to ignore it, it seems to me that one would be cutting at one of the root principles on which salvage is awarded, namely, that of encouragement to mariners to perform services of a salvage nature. If allowance is not made for the fact of taxation, it simply means that the reality of the award made in cases of this sort is so much the less. In those circumstances I have thought it right to take that matter into consideration. I have not sought to do so by way of any exact calculation. I think it must necessarily be dealt with in a rough and ready way, simply as an element to be considered. It appears to me that one is in very much the same position with regard to that as one is in relation to expenses necessarily incurred in the performance of a salvage service. For many years that has been regarded as an element which the court should take into consideration in awarding salvage, and for this reason, that if one ignores the expense which has to be incurred in rendering the service one may be left in the position that the salvage award is no reward at all and no encouragement to mariners to perform salvage services. It appears to me that in the case of personal services one ought to pay just the same regard to the incidence of taxation as, in the case of other services, one pays to the incidence of expenses necessarily incurred. In the award which I propose to make, therefore, I think it is right to say that in the case of the master and in the case of such proportion of the crew as are of European extraction, I have thought the liability to taxation is an element to be taken into consideration. Moreover, I will go further and say that the awards I am about to pronounce are larger than they would have been if I had come to the conclusion that the tax element was to be wholly disregarded.

---

[1] [1956] A.C. 185; [1955] 3 All E.R. 796.

Bearing all these various considerations in mind, bearing in mind the excellent work done by the salvors, albeit in favourable conditions, and bearing in mind the size of the fund at my disposal, I think that this is a case which merits an award to the master of £800, and to the crew, in respect of whom I am only asked to make one consolidated award, of £1,800, making a total of £2,600.

Judgment for the plaintiffs.

Solicitors: *Alsop, Stevens & Co.; Batesons & Co.*

A. S-R.

ALSEY STEAM FISHING CO. LTD. *v.* HILLMAN (OWNERS) AND OTHERS.
THE KIRKNES.

1956
Nov. 19, 20.
Willmer J.

[1955 A. 2307.]

Shipping—Limitation of liability—Contractual exclusion—Towage—Towowners to pay for " all loss or damage "—Tug in collision with tow—Whether parties contracting out of section 503 *of the Merchant Shipping Act,* 1894*—United Kingdom Standard Towage Conditions—Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503.

Shipping — Towage — Contract — Implied agency — Whether tugowners contracting as agents for master and crew of tug—United Kingdom Standard Towage Conditions.

Contract—Parties—Enforcement by third party.

The United Kingdom Standard Towage Conditions were incorporated into a contract under which tugowners contracted to use their tug *Hillman* to tow the plaintiffs' vessel *Kirknes.* The *Hillman* whilst towing the *Kirknes* was in collision with her and sank with the loss of the lives of four members of her crew. The tugowners started an action against the plaintiffs, the owners of the tow, claiming damages for negligence, and a declaration that, under the terms of the towage conditions, the owners of the tow were liable to compensate the tugowners for loss of the *Hillman* and any damage resulting therefrom, and to indemnify the tugowners against all claims in respect of loss of life or personal injuries sustained by the members of the crew of the *Hillman* in consequence of the collision. Claims for damages were also put forward on behalf of life claimants. The plaintiffs admitted liability but sought to limit their liability, pursuant to section 503 of the Merchant Shipping Act, 1894.

The United Kingdom Standard Towage Conditions inter alia provided: "(2) On the employment of a tug, the master and "crew thereof become the servants of and identified with the hirer "and are under the control of the hirer or his servants or "agents . . . (3) The tugowner shall not, whilst towing, bear or "be liable for damage of any description done by or to the tug, "or done by or to the hirer's vessel, or for loss of or damage to "anything on board the hirer's vessel, or for loss of the tug or "the hirer's vessel, or for any personal injury or loss of life, "arising from any cause, including negligence at any time of the "tugowner's servants or agents, unseaworthiness, unfitness or "breakdown of tug, its machinery, boilers, towing gear, equipment or hawsers, lack of fuel, stores or speed, or otherwise, and "the hirer shall pay for all loss or damage and personal injury or "loss of life and shall also indemnify the tugowner against all "consequences thereof, . . ."

On a preliminary question whether the plaintiffs were entitled to limit their liability under section 503 of the Merchant Shipping Act, 1894, with reference to the claims of the tugowners and the life claimants:—

Held, (1) that in so far as the tugowner's claim was one in respect of a contractual liability to indemnify and compensate the tugowners for a loss on the happening of a certain event, the plaintiffs could not limit their liability.

The Stonedale No. 1 [1956] A.C. 1; [1955] 2 All E.R. 689 applied.

(2) That in so far as the tugowner's claim was based on damages for negligence, the wording of the contract was not sufficiently clear to exclude the operation of section 503 of the Merchant Shipping Act, 1894, which would still have been applicable to limit the liability in damages of the tow to the tug.

The Satanita [1897] A.C. 59; 13 T.L.R. 58 distinguished.

(3) That it could be inferred from the terms of the contract that the tugowners were contracting as agents for the master and crew of their tug, but that since the claims of the life claimants were for damages only and the terms of the contract were not sufficiently clear to exclude the operation of section 503 of the Merchant Shipping Act, 1894, the plaintiffs could limit their liability as regards these claims.

Adler v. *Dickson* [1955] 1 Q.B. 158; [1954] 3 All E.R. 397 and *The Friesland* [1904] P. 345; 20 T.L.R. 699 considered.

PRELIMINARY point of law.

The plaintiffs, the owners of the *Kirknes*, sought a decree of limitation of liability in respect of damage and loss of life arising out of a collision between their vessel and the first defendants' tug *Hillman*, which was at the material time towing the *Kirknes*. The first defendants denied that the plaintiffs were entitled to a decree on the ground that the contract of towage incorporated the United Kingdom Standard Towage Conditions, under the terms of which the plaintiffs had contracted to pay for all loss or damage sustained by the owners of the *Hillman* and to indemnify them in respect of all consequences thereof. The life claimants denied that the plaintiffs were entitled to a decree as against them on the ground that the plaintiffs had contracted with the master and crew of the *Hillman* to pay all damage, the owners of the tug at the time of making the contract impliedly acting as agents for the master and crew.

The relevant clauses of the United Kingdom Standard Towage Conditions provided:

"(2) On the employment of a tug, the master and crew "thereof become the servants of and identified with the hirer "and are under the control of the hirer or his servants or agents, "and anyone on board the hirer's vessel who may be employed "and/or paid by the tugowner shall be considered the servant "of the hirer.

"(3) The tugowner shall not, whilst towing, bear or be liable "for damage of any description done by or to the tug, or done "by or to the hirer's vessel, or for loss of or damage to anything "on board the hirer's vessel, or for loss of the tug or the hirer's "vessel, or for any personal injury or loss of life, arising from "any cause, including negligence at any time of the tugowner's "servants or agents, unseaworthiness, unfitness or breakdown of "tug, its machinery, boilers, towing gear, equipment or hawsers, "lack of fuel, stores or speed, or otherwise, and the hirer shall "pay for all loss or damage and personal injury or loss of life "and shall also indemnify the tugowner against all consequences "thereof, and the tugowner shall not, whilst at the request "express or implied of the hirer rendering any service other than "towing be held responsible for any damage done to the hirer's "vessel and the hirer shall indemnify the tugowner against any "claim by a third party (other than a member of the crew of "the tug) for personal injury or loss of life. Provided that any "such liability for loss or damage as above set out is not caused "by want of reasonable care on the part of the tugowner to make "his tugs seaworthy for the navigation of the tugs during the "towing or other services—the burden of proof of any failure "to exercise such reasonable care being upon the owner of the "tow.

"(4) The hirer shall not bear or be liable for any loss or "damage of any description done by or to the tug otherwise than "whilst towing, as herein defined, or for loss of life or injury "to the crew of the tug. Nevertheless nothing contained herein "shall prejudice any claim the tugowner may have in Admiralty "or at common law against the hirer."

At the summons for directions in the action an order was made that a preliminary point of law be tried as to whether the terms of the United Kingdom Standard Towage Conditions precluded the plaintiffs from limiting their liability.

Waldo Porges Q.C. and *Maurice E. C. Rena* for the tugowners. The plaintiffs are not entitled to avail themselves of the provisions of section 503 of the Merchant Shipping Act, 1894, for two reasons. First, the tugowners are not here claiming damages but under the towage contract are claiming a debt. The plaintiffs have contracted that they will pay and indemnify the tugowners for all damage to their tug. Section 503 is only available to a shipowner to limit a liability to damages: *The Stonedale No. 1*,[1] *per* Viscount Simonds. There is a difference between a liability to damages and a contractual liability to indemnify. This difference is borne out by the insurance cases, which are analogous to the present case: *Furness Withy & Co.* v. *Duder*[2] and *Hall Brothers Steamship Co. Ltd.* v. *Young*.[3] This is a claim in contract and not for damages caused by improper navigation. Secondly, if this is a claim for damages and section 503 is available to the plaintiffs, then it is submitted that the plaintiffs have contracted out of that section: they have contracted to pay for "all loss or damage" and cannot avail themselves of section 503: *The Satanita*.[4] [*The President Van Buren*[5] was also referred to.]

Derek H. Hene for the life claimants. As against the life claimants the plaintiffs are not entitled to avail themselves of section 503. The life claimants rely on the decision in *The Satanita*,[6] and to do so it must be shown that the tugowners when concluding the towage contract were acting as agents for the master and crew of the tug. In the normal course of business the owners of a tug continually contract as agents for the master and crew: *The Friesland.*[7] The decision of the Court of Appeal in *Adler* v. *Dickson*[8] did not abrogate the principle in *The Friesland.*[9] In *Adler* v. *Dickson*[10] it was held that on the particular wording of that contract it could not be inferred that the owners were acting as agents for the master and crew. It can be inferred from the wording of this contract that the tugowners were contracting as agents for the master and crew of the tug. The life claimants are unable to claim an indemnity, but, once the agency has been established, have an action based in contract or in tort. It is submitted that by the contract the plaintiffs have contracted out of section 503 in undertaking to "pay for all loss or damage "and personal injury or loss of life." [Kennedy's Law of Civil Salvage, 3rd ed., pp. 277 and 278; Bucknill's Tug and Tow, 2nd ed., p. 7, and *Great Western Railway Co.* v. *Royal Norwegian Government*[11] were also referred to.]

---

[1] [1956] A.C. 1, 7.

[2] [1936] 2 K.B. 461; [1936] 2 All E.R. 119.

[3] [1939] 1 K.B. 748; 55 T.L.R. 506; [1939] 1 All E.R. 809.

[4] [1897] A.C. 59.

[5] (1924) 16 Asp.M.C. 444.

[6] [1897] A.C. 59.

K. S. Carpmael Q.C. and *G. R. A. Darling* for the owners of the tow. *The Friesland*[12] followed *The Inchmaree*[13] and both cases concerned salvage claims. The decision in *The Friesland*[14] merely states the provisions of section 156 of the Merchant Shipping Act, 1894. Some of the clauses in this contract concern the master and crew of the tug, but, since the decision of the House of Lords in *Mersey Docks and Harbour Board* v. *Coggins*,[15] it is no longer possible to transfer or deal with one's servants in the same manner as was considered possible previous to that decision. Here it is submitted that neither party was contracting on the basis that the tugowners were acting as agents for their master and crew. If a party is contracting as an agent for a third party, this must be brought to the notice of that third party by express words or necessary implication: *Adler* v. *Dickson*, *per* Denning L.J.[16] and Jenkins L.J.[17] It is submitted that in this contract there is not such a necessary implication.

A party is assumed to be contracting according to the provisions of the law and clear words are necessary for a party to contract out of the provisions of a statute: *Ingram & Royle Ltd.* v. *Services Maritimes du Tréport Ltd.*, *per* Vaughan Williams L.J.[18] and Buckley L.J.[19] It is submitted that the words "all

---

[7] [1904] P. 345; 20 T.L.R. 699.

[8] [1955] 1 Q.B. 158.

[9] [1904] P. 345.

[10] [1955] 1 Q.B. 158.

[11] (1945) 61 T.L.R. 236; [1945] 1 All E.R. 324; 78 Ll.L.Rep. 152.

[12] [1904] P. 345.

[13] [1899] P. 111.

[14] [1904] P. 345.

[15] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.

[16] [1955] 1 Q.B. 158, 184.

[17] Ibid. 186.

[18] [1914] 1 K.B. 541, 549, 551.

[19] Ibid. 555, 557.

"loss or damage" are not sufficiently clear to deprive the plaintiffs of the provisions of section 503.

[Temperley's Merchant Shipping Acts, 5th ed., pp. 110 and 488; *Virginia Carolina Chemical Co.* v. *Norfolk and North America Steam Shipping Co.*[20]; *Admiralty Commissioners* v. *Valverda (Owners)*,[21] and *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*[22] were also referred to.]

Waldo Porges Q.C. and *Derek H. Hene* replied.

WILLMER J. stated the facts and continued: The preliminary point which I have to decide has been stated in the order for directions. In the course of the hearing before me certain amendments to the terms of reference were made with the consent of all parties. The question as amended is in the following terms: "Assuming that the plaintiffs are able to "prove all the facts alleged in the statement of claim, and "it being admitted by the plaintiffs that the *Hillman* was "at the material time towing the *Kirknes* on the terms of the "United Kingdom Standard Towage Conditions, are the plaintiffs "precluded by those towage conditions or otherwise from limiting "their liability as against the defendants?"

The owners of the *Hillman* had started their own action against the present plaintiffs, that is, action folio 158. By their writ and statement of claim in that action they claimed, alternatively, damages for negligence, on the one hand, and on the other a declaration that under the terms of the towage conditions the owners of the *Kirknes*, the present plaintiffs, had accepted liability regardless of negligence to pay for the damage caused to the tug.

The towage conditions (as set out in the contract) provide by clause 2 that: "On the employment of a tug, the master "and crew thereof become the servants of and identified with "the hirer and are under the control of the hirer or his servants "or agents." For the moment nothing turns on clause 2, although I shall have to come back to it in determining one aspect of the case. The most important clause is clause 3, which is a long clause and clearly divisible into parts, in the sense that it deals with various matters. The two first parts of the clause are those which are relevant to this case. The clause provides: "The tugowner shall not, whilst towing, "bear or be liable for damage of any description done by or

[20] [1912] 1 K.B. 229; 28 T.L.R. 85.

[21] [1938] A.C. 173.

[22] [1931] A.C. 726; 47 T.L.R. 542.

"to the tug, or done by or to the hirer's vessel, or for loss of "or damage to anything on board the hirer's vessel, or for loss "of the tug or the hirer's vessel, or for any personal injury or "loss of life, arising from any cause, including negligence at any "time of the tugowner's servants or agents, unseaworthiness, "unfitness or breakdown of tug, its machinery, boilers, towing "gear, equipment or hawsers, lack of fuel, stores or speed, or "otherwise." I stop there to remark that so far the clause is dealing with all those things for which the tugowner is not to be responsible. It goes on next with the following important words, "and the hirer shall pay for all loss or damage and personal "injury or loss of life and shall also indemnify the tugowner "against all consequences thereof. . . ." The rest of the clause does not matter for the purposes of this case, for it concerns the mutual rights and liabilities during periods when the tug is performing some service other than towing. The crucial words for the purpose of the question I have to decide are those which I have just read, "the hirer shall pay for all loss or damage and "personal injury or loss of life."

The present plaintiffs in due course admitted liability in the action brought by the owners of the *Hillman*. That admission is contained in a letter of August 10, 1956, written by the present plaintiffs' solicitors to the solicitors for the owners of the *Hillman*, and it is, I think, pertinent to remark that the admission of liability is in perfectly general terms. I say that because it is clear that the claim put forward in the first instance on behalf of the owners of the *Hillman* was put forward in the two separate ways to which I have referred. It seems to me, therefore, having regard to the general nature of the admission of liability, that I must proceed on the basis that the present plaintiffs have admitted the validity of both the claims put forward by the owners of the *Hillman*.

Those two claims are, first, for damages in respect of alleged negligent navigation; secondly, there is a claim that, quite regardless of any question of negligence, the present plaintiffs, by reason of the towage conditions, are under a contractual liability to pay for all loss or damage to the tug occurring in the course of the towage; in other words, it is contended that, as a matter of contract, the present plaintiffs are in the position of insurers of the tug during the time that the towage is being carried on. In so far as the tugowners' claim is a claim for damages in respect of negligent navigation, it is quite clear that, prima facie at any rate, the plaintiffs come within section 503 of the Merchant

Shipping Act, 1894, that is to say, the section conferring the right of limitation. That section, so far as relevant to this case, is in the following now well-known terms: "The owners of a ship, "British or foreign, shall not, where all or any of the following "occurrences take place without their actual fault or privity; "(that is to say,) . . . (*c*) Where any loss of life or personal "injury is caused to any person carried in any other vessel by "reason of the improper navigation of the ship; (*d*) Where any "loss or damage is caused to any other vessel, or to any goods, "merchandise, or other things whatsoever on board any other "vessel, by reason of the improper navigation of the ship; be "liable to damages beyond the following amounts." Prima facie, therefore, that section would appear to apply directly in so far as the tugowners' claim is a claim for damages. In so far, however, as their claim is a claim under the contract, it appears to me that wholly different considerations apply.

It is not so long since it fell to me to try the limitation action in *The Stonedale No. 1*,[1] a case which subsequently went to the Court of Appeal [2] and the House of Lords.[3] The decision of the House of Lords in that case is, in my judgment, directly in point here, and appears to me to preclude me from holding that section 503 of the Act applies to the tugowners' claim in so far as that is based on their contractual rights. I must emphasise again that that aspect of their claim is not a claim for damages, but is a claim in respect of a contractual liability to pay for a loss on the happening of a certain event. *The Stonedale No. 1* [3] was concerned, not with a contractual liability to pay in a certain event, but with a statutory liability imposed on shipowners, under the provisions of the Manchester Ship Canal Acts, to pay for the expense of raising the wreck in the event of their vessel sinking so as to cause an obstruction in the canal. I need not read any lengthy extracts from the report of *The Stonedale No. 1* [3]: a few short extracts will suffice. The leading speech, with which all the other members of the House agreed, was delivered by Viscount Simonds. After reciting, as I have recited, the relevant provisions of section 503 of the Act, Viscount Simonds goes on [4]: "My Lords, the vital words in this section to which, as it appears "to me, insufficient regard was paid in the argument of the "appellants, are 'be liable to damages'. The relief given to

---

[1] [1953] 1 W.L.R. 1241; [1953] 2 Lloyd's Rep. 319.

[2] [1954] P. 338; [1954] 2 All E.R. 170; [1954] 1 Lloyd's Rep. 291.

[3] [1956] A.C. 1; [1955] 2 All E.R. 689; [1955] 2 Lloyd's Rep. 9.

[4] [1956] A.C. 1, 8.

"shipowners is in respect of their liability to damages and "nothing else." At the bottom of the same page Viscount Simonds comes back to the same point and again reiterates: "The only liability which the shipowner can limit is a liability "to damages." He then proceeds: "I return, then, to section "32 of the Manchester Ship Canal Act, 1936, and at once ask "the pertinent question whether the respondents in making their "claim for the expenses incurred in raising the sunken vessel "and, if necessary, proceeding in a court of competent jurisdiction for recovery of that sum as a debt seek to make the "appellants liable to damages. It appears to me plain that "they do not. Your Lordships were pressed by the argument "that the Manchester Ship Canal Act should not be construed "as taking away from shipowners a right conferred by a public "Act. In my opinion no such question arises. The Merchant "Shipping Acts relate to limitation of liability to damages; the "Manchester Act confers a statutory right upon the company "to raise a sunken vessel and to recover the expenses of raising "her from the owner as a debt. The one does not derogate from "the other and your Lordships are not called on to resolve any "conflict between the provisions of a public Act and a local or "private Act."

I can see no distinction in principle between the statutory right conferred upon the Manchester Ship Canal Company under their private Act and the contractual right which the tugowners in this case obtain by reason of the conditions of their towage contract, that is to say, their contractual right to be paid for all loss or damage, including loss of or damage to the tug, should that event take place during the course of the towage. The fact that the tugowners also had an alternative claim in damages does not seem to me to affect the case, any more than the fact that in *The Stonedale No. 1*[5] the Manchester Ship Canal Company could also have had a claim for damages for negligent navigation affected the decision in that case. That is a point which was very much argued in the case of *The Stonedale No. 1*,[5] and is dealt with in a further passage in his speech by Viscount Simonds. He says this[6]: "My Lords, it has been decided, and for the "purposes of this case I will assume that it has been correctly "decided, that, where, through negligence on the part of the "owners, a vessel has sunk in such a position as to cause an "obstruction in a navigable channel maintained by a conservancy "authority, that authority has, in addition to any statutory

---

[5] [1956] A.C. 1.

[6] Ibid. 9.

"rights it may have, a common law right to recover against the "owners as damages the reasonable cost of removing the "obstruction: see *Dee Conservancy Board* v. *McConnell.*[7] This "decision was not called to the attention of Langton J. when he "heard the case of *The Millie*,[8] and it has been suggested that, "had that learned judge been aware of it, he might have come "to a different conclusion. I do not see why he should. It may "have to be decided some day whether a shipowner faced with "such a common law claim can successfully limit his liability "in respect of it under the Act of 1900. But it appears to me "that this affords no argument for saying that a shipowner has "a similar right in respect of a claim which is not a common "law claim for damages for negligence but is a claim wholly "independent of negligence and founded solely on statute." Substituting the word "contract" for "statute," what Viscount Simonds said in that passage appears to me to be directly applicable to this case. Holding myself, therefore, bound by the decision in *The Stonedale No. 1*,[9] the principle of which, I think, is directly in point here, it seems to me that that is enough to dispose of the case so far as the tugowners are concerned. I do not think it is necessary, therefore, to refer to some of the other authorities which were cited to me by way of analogy, for instance, *Furness Withy & Co. Ltd.* v. *Duder.*[10] Having regard to what I consider to be a direct decision on the point by the House of Lords in *The Stonedale No. 1*,[11] I do not think it is necessary to refer to the other authorities.

I must, however, consider the alternative claim for damages, and I do so for several reasons. First, it may be held that my decision on the contractual claim is wrong. Secondly, the tugowners have argued before me that, even if their claim were to be regarded as a mere claim for damages, nevertheless the effect of the towage conditions would still be such as to abrogate section 503 of the Merchant Shipping Act. Thirdly, I have to consider the position of the life claimants, in respect of whom it is, I think, conceded that they have, and could have only a claim for damages.

While it is perfectly true that a shipowner liable in damages for improper navigation is prima facie within section 503 of the Merchant Shipping Act, and, therefore, prima facie entitled to limit his liability, it is equally true that it is perfectly competent for him to contract out of his rights in that respect. I have been referred to cases where the question has arisen whether a shipowner, in his capacity as carrier, had, or had not, by the terms of his contract, contracted out of the benefit of section 502 of the Act, that is, the section which concerns liability for fire. In *Virginia Carolina Chemical Co.* v. *Norfolk and North America Steam Shipping Co.*[12] it was held by the Court of Appeal, on the construction of the particular contract of carriage in that case, that section 502 had been excluded. On the other hand, two years later, in *Ingram & Royle Ltd.* v. *Services Maritimes du Tréport Ltd.*,[13] upon a clause in rather different terms, the Court of Appeal came to the opposite conclusion, and decided that the operation of section 502 was not excluded. I would add, in relation to those two cases, that the particular decisions in both of them have been specifically approved by the House of Lords in *Louis Dreyfus & Co.* v. *Tempus Shipping Co.*[14]

---

[7] [1928] 2 K.B. 159.

[8] [1940] P. 1.

[9] [1956] A.C. 1.

[10] [1936] 2 K.B. 461; [1936] 2 All E.R. 119.

[11] [1956] A.C. 1.

In the course of giving judgment in *Ingram & Royle Ltd.* v. *Services Maritimes du Tréport Ltd.*[15] Vaughan Williams L.J. refers to what had been said by Buckley L.J. in *Virginia Carolina Chemical Co.* v. *Norfolk and North America Steam Shipping Co.*,[16] and goes on as follows[17]: "After stating that the true "construction of section 502 was that it relieved the shipowner "in the case of fire not only from his liability as an insurer, but "also from his liability under an implied warranty of seaworthi- "ness, the learned Lord Justice said that it was common ground "that it was competent for the shipowner to contract himself "out of the benefits conferred by the statute if he used apt "words for that purpose in the bill of lading. In my opinion "the contract must be clear to that effect. It is not sufficient "to show a contract which is reasonably capable of two inter- "pretations. In order to exclude the statute, the court must "come to the conclusion that the interpretation which the cargo "owners contend for is the true interpretation of the contract, "and not merely a possible interpretation of it." A little later in his judgment, Vaughan Williams L.J. says this, much to the same effect[18]: "Shortly my judgment is this, that prima "facie there is included in the bill of lading the statutory protec- "tion of the shipowners under section 502. If the protection is "not expressly or impliedly excluded, it follows that one starts

---

[12] [1912] 1 K.B. 229; 28 T.L.R. 85.

[13] [1914] 1 K.B. 541.

[14] [1931] A.C. 726; 47 T.L.R. 542.

[15] [1914] 1 K.B. 541.

[16] [1912] 1 K.B. 229, 240.

[17] [1914] 1 K.B. 541, 551.

[18] [1914] 1 K.B. 541, 553.

"with the proposition that the conditions in this bill of lading "are accompanied by the provision contained in section 502 for "the protection of the shipowners. I have therefore to see if I "can find anything in the words of this bill of lading which "excludes the operation of that protection." It seems to me that when I am dealing, as I am in this case, with section 503 of the Act, and when I am dealing, not with a contract between carrier and cargo owner, but with a contract between tug and tow, I have, nevertheless, to approach the problem in exactly the same way; that is to say, section 503 of the Act applies unless quite clearly it is expressly or impliedly excluded by the terms of the contract. I was reminded by counsel for the plaintiffs, and very properly reminded, that one must approach the consideration of a question of that sort on the basis that the parties should be assumed to be contracting in accordance with the known state of the law. Prima facie, therefore, section 503 applies, in so far as the claim is one for damages, unless I can find some clear provision in the contract which expressly or impliedly excludes its operation.

The case most helpful both to the tugowners and, more particularly, to the other claimants, who depend entirely on the claim for damages, is that of *The Satanita*,[19] a case which went to the House of Lords. There a collision had occurred between two yachts which were engaged in a race in the course of a regatta. In entering their respective yachts for the race, the yacht owners had been required to sign a document undertaking to abide by the rules, and one of the rules provided that in the event of a yacht disobeying any of the rules, the owner was to be liable for "all damages arising therefrom." The question arose whether that contractual agreement between the yacht owners did, or did not, exclude the operation of the limitation section of the Merchant Shipping Act, which at that time was section 54 of the Act of 1862. The House of Lords decided the case on the basis that there was a contract, entered into by the respective yacht owners, on the true construction of which the words used, namely, "all damages," excluded the operation of the relevant section of the Merchant Shipping Act. The leading speech was delivered by Lord Halsbury L.C., who in the course of it said [20]: "It has been urged upon us that unless the parties used very "clear language they must be supposed to be contracting according to the known state of the law with regard to ships coming "into collision. I do not deny that considerations of that sort

---

[19] [1897] A.C. 59; 13 T.L.R. 58.

" are intelligible and reasonable. On the other hand, I think it " cannot be denied that the case of yachts is different from that " of merchant vessels." He then goes on to point out the different conditions in which yachts engaged in a regatta are navigating, as compared with merchant ships carrying on ordinary voyages. He continues [20]: " Now, apart from any other con-" sideration, looking to the fact that part of the contract is that " disobedience of the rules shall make the party who is guilty of " the disobedience liable to damages—' *all* damages '—if I am to " assume that the parties must have known what the condition " of the law was in reference to ordinary merchant ships, I think " the balance is in favour of those who contend that it would " have been proper and appropriate, if they had intended to have " that limitation of liability, to put some words in the contract " to place it beyond doubt. These words are not legal words— " they are popular words: you pay ' all damages ' if you disobey " the rules. I cannot help thinking, therefore, that the true " intention of the parties (which, after all, is the thing we have " to look at) is to be found in the language they have used; and, " having regard to the considerations I have referred to, it appears " to me that the word ' all ' has no significance at all unless it " is intended to be used in its popular and natural meaning, and " that the expression that they are to pay ' all damages ' does " not mean damages as limited by the Merchant Shipping Act."

In that case the contract which the House of Lords found was a contract to pay " all damages," that is to say, it was a contract dealing specifically with damages. It is, however, to be remarked that the clause I am concerned with here does not, on the face of it, deal with damages at all. The words of clause 3 have regard to the liability to pay for all loss or damage that may arise in a certain event. It is true that word " all " is used in the clause I have before me, just as the word " all " was used, and was very much stressed, in *The Satanita*.[21] But it seems to me that when one seeks to attach the proper construction to the use of a word like that, one must examine the context in which it is used. In *The Satanita* [21] the word " all " was used in a context in which it would, I think, have been difficult to find any other meaning for it, except " all " as a matter of quantum. Here, however, the word " all " is used in a context in which it may very well be that on its true construction it refers to " all " kinds of loss or damage. The words I have quoted follow on a long passage in which have been enumerated a number of types

[20] [1897] A.C. 59, 62.

[21] [1897] A.C. 59.

of loss or damage, for which it is provided that the tugowner shall not be liable; and I think it may well be that the use of the word "all" in this context implies no more than a reference back to the various kinds of loss or damage previously enumerated; that is to say, it is, in effect, picking up in one word what had been described in a great many words in the preceding lines. If that assumption be right, it gives a meaning to the word "all" without the necessity of inferring that it was intended to refer to the question of quantum. As has been pointed out, the words of this clause in the contract are by no means clear, and I should find it difficult to say, particularly as the word "damages"—in the plural—is nowhere mentioned, that the clause made it clear that the parties intended to contract out of section 503 of the Merchant Shipping Act, in so far as the tugowner might have a claim for damages. In other words, it seems to me that, on its true construction, the contract in this case is distinguishable from the contract in *The Satanita* [21] case. In so far as the tugowners' claim is a claim based on damages for negligence, I should therefore have held, had it been material to do so, that they have not contracted out of section 503, but that that section still applied to limit the liability in damages of the tow to the tug. But, for reasons which I have already given, that, so far as the tugowners are concerned, is an academic question; for, in my judgment, they are entitled to recover in full on their alternative claim in contract, pursuant to the authority of *The Stonedale No. 1.*[22]

What I have said in relation to section 503 not being excluded so far as concerns claims for damages for negligence would, in any case, be fatal to the argument put forward on behalf of the life claimants. I say that because it is not suggested that the life claimants have anything other than a claim for damages. That makes it strictly unnecessary for me to reach any concluded decision upon the extremely difficult question which has been canvassed before me, namely, whether, if my decision had been otherwise, the life claimants would have been entitled to rely on the contract between the tugowners and the towowners, so as to exclude the operation of section 503. The point has, however, been taken on behalf of the life claimants that the tugowners, in making their contract with the plaintiffs, were acting not only for themselves, but also as agents for the crew of the tug. If that be right, and if I had been able to hold that the terms of the contract were such as to exclude the operation of section 503

[21] [1897] A.C. 59.

[22] [1956] A.C. 1.

in relation to claims for damages, then it is said that the life claimants would be entitled to the benefit of the contract.

In support of the general proposition that owners of a ship can bind the master and crew by the contracts into which they enter, the decision in *The Friesland* [23] was cited to me. It seems to me, however, that that is a decision which should not be pressed too far. I think it has to be borne in mind that the question which arose there arose in connexion with a right to salvage, as to which I may properly remark that a master and crew have very special rights; and I am not for the moment satisfied in those circumstances that the decision in *The Friesland* [23] can properly be invoked as applicable to a contract of this sort.

It seems to me that more support for the argument on behalf of the life claimants is to be derived from the principles underlying the decision of the Court of Appeal in *Adler* v. *Dickson*.[24] That case was, of course, the converse of the present case. It did not involve a claim of any sort by a master and crew against a third party. It was the reverse case of a claim by an outside party against a master and crew who, by way of defence, claimed to be protected by the terms of the passenger's ticket, into which the passenger had entered with the employers of the master and crew. On the facts of the particular case it was held that the master and crew were not entitled to rely on the exemptions contained in the owners' contract. It is to be observed, when one studies the facts of the particular case, that in that case the clause relied on only purported to protect the owners, and did not purport to protect the owners' employees. But in the course of the case there was considerable citation of authority, and I think it was recognized by at least a majority of the court that there may be cases in which a shipowner, in contracting with outside parties, is held to contract on behalf of the master and crew so as to bind them, that is to say, cases where a shipowner may stipulate for exemption from liability not only for himself, but for his servants. In that case Denning L.J. said [25]: "My "conclusion therefore is that, in the carriage of passengers as well "as of goods, the law permits a carrier to stipulate for exemp- "tion from liability not only for himself but also for those whom "he engages to carry out the contract: and this can be done by "necessary implication as well as by express words. When such "a stipulation is made, it is effective to protect those who render

---

[23] [1904] P. 345; 20 T.L.R. 699.

[24] [1955] 1 Q.B. 158; [1954] 3 All E.R. 397.

[25] [1955] 1 Q.B. 158, 184.

"services under the contract, although they were not parties to "it, subject however to this important qualification: The injured "party must assent to the exemption of those persons. His "assent may be given expressly or by necessary implication, but "assent he must before he is bound: for it is clear law that an "injured party is not to be deprived of his rights at common law "except by a contract freely and deliberately entered into by him; "and all the more so when the wrongdoer was not a party to the "contract, but only participated in the performance of it." I think it is true to say that that expression of view on the part of Denning L.J. was not, at any rate, wholly supported by Jenkins L.J.,[26] although all the members of the court agreed in the decision of the case. It does seem to me, however, that support for Denning L.J.'s view is to be derived from what Morris L.J. said,[27] for he also appears to have recognized the possibility of an employer contracting on behalf of his servants.

If it be right that it is possible, in a proper case, for a master and crew to rely for purposes of defence on the terms of a contract between their owners and a third party, it seems to follow logically that they should equally be entitled to do so in a case such as the present where, for instance, they are resisting a claim for limitation of liability. The question is whether the contract is one where it can clearly be seen that it was entered into by the employers of the master and crew, not only on their own behalf, but also on behalf of the master and crew. As I have said, in *Adler* v. *Dickson*,[28] the court decided that the particular contract was not one entered into on behalf of the master and crew. But in this case it seems to me that there is material which might well justify the view that the tugowners, in making this contract, were contracting not only on behalf of themselves, but also as agents for the master and crew. As has been pointed out by counsel for the life claimants, this contract throughout its important clauses makes specific provisions with regard to the rights and immunities of the tugmaster and crew of the tug. It seems to me that the provisions of clause 2, whereby the master and crew are made during the currency of the contract the temporary servants of the hirer, are not unimportant, and support the inference that the contract was intended to be made on behalf of the master and crew, as well as on behalf of the owners; similarly, with regard to the references to personal injury and loss of life in clause 3, and again in clause 4. With regard to clause 4,

---

[26] [1955] 1 Q.B. 158, 185.

[27] [1955] 1 Q.B. 158, 196.

[28] [1955] 1 Q.B. 158.

I would just say in passing that, in so far as it is material to this case, I should desire to adopt the construction of that clause which was put upon it by Atkinson J. in *Great Western Railway Co.* v. *Royal Norwegian Government.*[29] Looking at all these clauses together, there is, in my judgment, material for drawing the inference that the tugowners in this case, in making this contract with the ship, were contracting not only on behalf of themselves, but also as agents for their master and crew. To that extent I should feel disposed to accede to Mr. Hene's argument. Having regard, however, to what I have said before, it does not, I fear, get him anywhere because this contract, on its true construction, does not, in my judgment, exclude the operation of section 503 of the Act so far as concerns claims for damages, which is all that the life claimants can bring.

In those circumstances the result of my judgment on the preliminary point is that the tugowners are entitled on their contractual claim to recover their damages in full. So far as concerns that claim, the plaintiffs are not entitled to the benefit of limitation of liability. On the other hand, so far as concerns the claims of the life claimants, which are claims for damages, I hold that the plaintiffs are entitled to the benefit of section 503.

Judgment for the defendants, the owners of the steam tug Hillman.
Judgment for the plaintiffs on the claims of the life claimants.
Leave to appeal granted.

Solicitors: *Middleton, Lewis & Co. for H. K. & H. S. Bloomer & Co., Grimsby; Andrew M. Jackson & Co., Hull; Botterell & Roche for Brown & Son, Grimsby.*

A. S-R.

---

[29] 61 T.L.R. 236; [1945] 1 All E.R. 324; 78 Ll.L.Rep. 152.

1956
July 30.

Collingwood J.

COLES *v.* COLES.

Bankruptcy—Sequestration—Husband and wife—Order for maintenance —Writ of sequestration issued in respect of husband's failure to pay —Subsequent bankruptcy of husband—Summons by trustee in bankruptcy to discharge writ—Husband in contempt of court at hearing of summons—No cause for discharge of writ—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 37 (1).

On August 31, 1954, a writ of sequestration was issued in respect of certain property of a respondent husband who was in contempt of court by reason of his failure to comply with the terms of an interim order for maintenance. On March 9, 1955, he committed an act of bankruptcy and on March 25, 1955, the bankruptcy petition was presented. An order was made on April 1, 1955, authorizing payment over to the wife by the sequestrators of moneys arising from charges on the property affected by the writ, the judge having full knowledge of the facts as they existed at that date. A receiving order was made on July 19, 1955, and the husband was adjudicated bankrupt on August 15, 1955. On February 7, 1956, the trustee in bankruptcy issued a summons asking for an order discharging the writ of sequestration and discharging so much of the order of April 1, 1955, as touched the writ of sequestration.

It was contended on behalf of the trustee in bankruptcy, at the hearing, that under the Bankruptcy Act, 1914, the effect of the adjudication was to vest title in the property in the trustee as from the act of bankruptcy, and that, since the writ of sequestration operated as a clog, the trustee was entitled to its discharge.

At the date of the hearing the husband continued to be in contempt of court:—

Held, that, since the writ of sequestration issued before the act of bankruptcy in respect of a debt as to which the wife could not prove in bankruptcy, although the property concerned was not, by virtue of the writ of sequestration, charged in favour of the person by whom it was issued, it passed to the trustee in bankruptcy in the same "plight" in which it was in the bankrupt's hands, namely, subject to all the equities and liabilities which affected it, to all dispositions validly made by the bankrupt, and to all rights validly acquired by third persons unless released by some express provision of the bankruptcy law. That being so, and the husband still being in contempt of court, the trustee in bankruptcy had failed to show good cause why the writ should be discharged.

In re Hastings, Ex parte Brown (1892) 61 L.J.Q.B. 654; 8 T.L.R. 683 and *In re Pollard, Ex parte Pollard* [1903] 2 K.B. 41 distinguished.

Bendall v. *McWhirter* [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307 applied.

SUMMONS issued by the trustee in bankruptcy adjourned into open court.

On December 21, 1951, a wife filed a petition for judicial separation on the grounds of cruelty and adultery; she also asked for alimony pending suit and for maintenance. On February 25, 1952, an order for alimony was made at the rate of £6 a week less tax. On March 5, 1952, the respondent husband, by his answer, denied the cruelty and adultery (alternatively alleging connivance by the wife) and there was a cross-prayer for relief on the ground of the wife's cruelty. On April 1, 1952, a writ of sequestration was issued in respect of money due under the alimony order. On April 8, 1952, this writ was discharged. On June 18, 1952, the order for alimony was varied, as from April 25, 1952, to £10 weekly less tax. On January 22 and 23, 1953, the cause was heard before Karminski J. In the course of the hearing the petition was amended, by leave, to one for dissolution, the respondent electing not to proceed with his answer. He gave undertakings to provide secured maintenance of not less than £250 per annum, and a decree nisi was granted to the wife. On April 8, 1953, this decree was made absolute. On April 15, 1953, an interim order was made by the registrar for maintenance at £10 a week as from decree absolute. The registrar also ordered an affidavit of documents; that order was not complied with. On March 3, 1954, an application was made before Karminski J. to commit the husband. At the hearing the husband gave undertakings to the court: (1) to bring payments under the interim order up to date within seven days; (2) to provide the wife's solicitors with certificates of deduction of income tax in respect of all the past payments; and (3) to provide similar certificates in respect of each future payment. Further, as to the secured provision for £250 per annum, he undertook within 42 days to grant to trustees a second mortgage on his interest in No. 46, Egerton Gardens; within a further 150 days to grant a first mortgage thereon; and, finally, on an extended or substituted lease being granted by the freeholder to substitute for the first mortgage on the old lease a first mortgage thereon. On July 8, 1953, a further writ of sequestration was issued in respect of failure to carry out the order of April 15, 1953. On June 4, 1954, this was discharged by Mr. Registrar Compton Miller. On July 14, 1954, another writ of sequestration was issued on the same grounds. On July 28, 1954, this was discharged by the same registrar. On August 31, 1954, yet another writ of sequestration was issued in respect of the same order, namely, April 15, 1953.

1956

COLES
v.
COLES.

The sequence of events thereafter was as follows: on November 29, 1954, Mr. Registrar Long gave liberty to the sequestrators to pay money collected under the writ to the wife. On December 17, 1954, another similar order was made. In the meantime, on October 11, 1954, an order had been made by the registrar to pay £135 6s. 3d. costs within seven days, and on November 8, 1954, another order was made by Mr. Registrar Forbes for the payment of a further £1,099 1s. 8d. in respect of costs. On September 2, 1954, the writ was registered at the Land Registry pursuant to section 6 of the Land Charges Act in respect of three properties in which the husband had an interest, namely: 46, Egerton Gardens, 167, Old Brompton Road, and 7, Belgrove Street, which remained effective as to the first named only, 46, Egerton Gardens, having been removed in respect of the other two.

On December 10, 1954, summonses came before Willmer J. asking for committal of the husband and two women who managed the properties 46, Egerton Gardens, and 7, Belgrove Street, both of whom had been served with copies of the writ. These summonses were in respect of interference with the sequestrators, and the matter was adjourned by Willmer J. to be heard by Karminski J. on the respondent's undertaking not to impede the sequestrators by himself or his agents.

On January 21, 1955, the matter came before Karminski J., together with an application by the husband to discharge the writ. This latter was refused. On the summons by the wife to commit him for contempt in failing to carry out his undertakings of March 3, 1954, Karminski J. committed him, directing that the order should lie in the registry for seven days to enable him to (1) bring maintenance payments under the interim order up to date; (2) provide the certificates of deduction of tax in respect of past payments; (3) give an undertaking as to future payments in this respect; and (4) to carry out the undertakings as to secured provision given to the court on March 3, 1954. From this order the husband appealed, and on March 25, 1955, the Court of Appeal dismissed the husband's appeal from committal by Karminski J., but directed that the writ should not issue for seven days to enable application to be made to the judge on terms agreed.

Meanwhile, on March 9, 1955, there had been an act of bankruptcy on the part of the husband, namely, non-compliance with a bankruptcy notice. On March 25, 1955, the bankruptcy petition was presented. On April 1, 1955, the matter came before

Karminski J. again and he suspended the enforcement of the order of committal made on January 21, 1955, until further order upon certain terms. These were: (1) the husband having granted a legal charge on 167, Old Brompton Road to secure £1,000 and undertaking to accept an offer of £7,300 the wife undertaking to remove her caution on the premises. The £1,000 to be payable on completion and to be applied to reduction of costs due by the respondent to the legal aid fund; (2) the husband having granted a second charge of £5,000 on 7, Belgrove Street, but such charge not to be in substitution of the secured provision of £250 undertaken to be provided by the husband but a temporary measure to secure the wife in anticipation of the provision of proper security within three months. These charges were executed in the judge's presence on that day.

Further, there were undertakings by the husband not to apply for discharge of the writ of sequestration until provision for such proper security, and the wife to concur in the sale of the Old Brompton Road property; the husband undertaking for himself and his agents not to interfere with the sequestrators; and the husband undertaking forthwith to produce to the wife's accountant all books and documents required and to give all information required. Further, the husband undertook to allow their accountants to attend forthwith at each of his hotels to see all accounts and to collect rents and account to the sequestrators, and further undertook to authorize payment of the accountants' fees by the sequestrators out of money coming into their hands; the husband undertaking that the costs of the mortgage granted by him to be paid by him on demand, and in default, by the sequestrators out of money coming into their hands.

On April 25, 1955, a further authority was given by the registrar to the sequestrators to pay money in their hands to the wife; a similar authority was given on June 1, 1955, and on June 10, 1955, a similar authority together with authority for any further collections on behalf of the wife to be paid without any further authority from the court until the writ was discharged or until further order. On July 19, 1955, the receiving order was made. On July 25, 1955, Karminski J. dismissed the application of the husband to vary the undertakings given on April 1, 1955; also he made no order on an application to attach the manageress of one of the properties for interference with the sequestrators.

On July 28, 1955, Karminski J. made an order for committal of the husband, this upon the ground of interference with the sequestrators, and on the same day the Court of Appeal dismissed the husband's application to suspend this committal. The husband remained in prison until August 19, 1955, when McNair J., upon his affidavit, discharged him from Her Majesty's prison at Brixton.

On August 15, 1955, the husband was adjudicated bankrupt, and on February 7, 1956, the trustee in bankruptcy issued a summons asking: (1) that the trustee in bankruptcy should be joined as a party to the cause to such extent and for such purposes as might be expedient; (2) for an order discharging so much of an order made by Karminski J., dated April 1, 1955, as touched a writ of sequestration of the property of the respondent dated August 31, 1954, and as touched the four sequestrators appointed by the said writ; (3) for an order discharging the writ of sequestration and the sequestrators appointed thereunder, and directing them to account to the trustee in bankruptcy, or otherwise, as the court should appoint, for their recoveries under the said writ. As to (1) the summons was not resisted by the petitioner.

At the hearing of the summons the husband was still in contempt of court.

Muir Hunter for the trustee in bankruptcy.

H. J. Phillimore Q.C., *G. H. Crispin* and *C. D. Lush* for the wife, petitioner.

Cur. adv. vult.

COLLINGWOOD J., reading his judgment, stated that he was giving judgment in open court in deference to the wishes of counsel, and continued: This is a summons issued by the trustee in bankruptcy of the respondent husband, asking (1) that the trustee in bankruptcy shall be joined as a party to the cause to such extent and for such purposes as may be just and expedient; (2) for an order discharging so much of an order made by Karminski J., dated April 1, 1955, as touches a writ of sequestration of the property of the respondent dated August 31, 1954, and as touches the four sequestrators appointed by the said writ; (3) for an order discharging the aforesaid writ of sequestration, and the sequestrators appointed thereunder, and directing them to account to the trustee in bankruptcy, or otherwise, as the court shall appoint, for their recoveries under the said writ.

[His Lordship referred to the facts and continued:] On behalf of the trustee in bankruptcy it was contended that the effect of the adjudication was to vest all property of the debtor in the trustee for division among his creditors generally, and that the trustee's title related back to the act of bankruptcy—that is to say, that on and after March 9, 1955, the property over which the sequestrators had been exercising powers ceased to be the property of the husband, Coles, and became the property of the trustee in bankruptcy and divisible among the creditors generally. It was contended that the writ of sequestration operated as a clog on the disposal of this property, 46, Egerton Gardens, and that the trustee was therefore entitled to the discharge of the writ; that it created, by itself, no charge or security in respect of the property of the debtor but merely substituted the sequestrators' hands for those of the debtor in its distribution, and could not hold as against the trustee in bankruptcy; and, further, that Karminski J. made the order of April 1, 1955, in defiance of the Bankruptcy Act,[1] knowing as he did of the act of bankruptcy (if not indeed of the presentation of the petition) when he allowed the charges to be executed.

In passing, I would point out that this court is not asked in this summons to deal with these charges specifically; the application is merely to discharge so much of the order of April 1, 1955, as touches the writ of sequestration and the sequestrators, and to discharge the writ itself.

A sequestration does not give the person issuing the writ any charge over the property concerned. This is clear from *Ex parte Hughes, In re Browne*,[2] and *In re Hastings, Ex parte Brown*,[3] and this is so even after payment of the money seized into court to the account of the sequestrator. In *In re Pollard, Ex parte Pollard*,[4] Romer L.J. says[5]: "But when the sequestration issues, and the sequestrators seize under it property of "the debtor, what result follows? I need scarcely point out that "the seizure by the sequestrators does not convert the property "seized into the property of the creditor. The next question is, "does the mere seizure by the sequestrators give the creditor a "charge upon each part of the property of the debtor which has "been seized? The answer must be: Clearly it does not. It does "nothing of the kind. In order that the creditor should obtain "a special charge upon some specific part of the property seized

---

[1] Bankruptcy Act, 1914, s. 37 (1): "The bankruptcy of a debtor, "whether it takes place on the "debtor's own petition or upon that "of a creditor or creditors, shall be "deemed to have relation back to, "and to commence at, the time of "the act of bankruptcy being com-"mitted on which a receiving order "is made against him . . ."

[2] (1871) L.R. 12 Eq. 137.

[3] (1892) 61 L.J.Q.B. 654; 8 T.L.R. 683.

[4] [1903] 2 K.B. 41.

[5] Ibid. 47.

"under the writ, he must go further, and must obtain some "order giving him a special right to or charge on a specific part "of the property."

On the other hand, sequestration is a process of contempt; the writ is available only where the person against whom it is issued is in contempt of court. Thus, in *Hulbert and Crowe* v. *Cathcart*,[6] Wills J. said[7]: "It is quite contrary to principle to "make an order in the nature of an order in contempt, as a "writ of sequestration is, when the person against whom it is "made is not in contempt." Similarly, in *Pratt* v. *Inman*,[8] Chitty J. said,[9] "Sequestration unquestionably was, and is, a "process of contempt," and he held that sequestration to compel the performance of a duty is not determined by the death of the person against whose estate and effects sequestration has been issued, and proceedings may therefore be continued against his legal personal representative.

The requisites for a discharge of the writ are quoted from Daniel's Chancery Practice,[10] in the Annual Practice as follows[11]: "Where the person whose property has been "sequestered has purged his contempt, an order may be obtained "on motion or summons for the discharge of the sequestration; "and directing the sequestrators to withdraw from possession, "and to pass their final accounts, and, after retaining their costs, "charges and expenses, and any payments properly made by "them, to pay the balance to him, and for the discharge there"from of the sequestrators from all liability in respect of their "office."

It was urged on behalf of the wife that the husband in the present case had done nothing towards purging his contempt, or even submitting himself to the court. He is over £500 in arrears under the order, nothing whatever having been paid since June, 1955. He is also in contempt in respect of a series of undertakings given by him to the court. No evidence has been put before the court as to his inability to pay the amount (as to which there has been no summons to vary); on the contrary, all the evidence goes to show that he is, and has been throughout, deliberately contumacious. The writ was issued long before the act of bankruptcy, to which the trustee's title relates back, and, as I have already stated, it is the writ which is the subject of the present application, and not the charges executed in the presence of the court subsequent to the bankruptcy petition. It was further contended on behalf of the wife that proceedings in respect of a debt or liability which is not provable in bankruptcy are unaffected by the making of a receiving order; and a wife's claim for alimony or maintenance is clearly not a debt provable in bankruptcy. (*Linton* v. *Linton*,[12] *In re Hawkins*,[13] *Kerr* v. *Kerr*.[14]) Orders for payment of arrears of maintenance may be made and enforced irrespective of the existence of a receiving order and whether the arrears fell due before or after the making of that order.

---

[6] [1894] 1 Q.B. 244.

[7] Ibid. 246.

[8] (1889) 43 Ch.D. 175; 6 T.L.R. 91.

[9] 43 Ch.D. 175, 179.

[10] p. 804.

[11] 1956 ed., 793.

Counsel for the trustee placed great reliance on the case of *In re Hastings, Ex parte Brown*.[15] There, the debtor having failed to comply with an order made in the Chancery Division to pay money into court, a writ of sequestration was issued to enforce the order under which the commissioners seized the debtor's house and goods. Shortly afterwards a bankruptcy petition was presented against the debtor in the county court, and an interim injunction was granted by that court restraining further proceedings under the writ, pending the hearing of the petition. A receiving order having been made, the injunction was made perpetual, and the judge refused an application to discharge the restraining order. On appeal, the Divisional Court held that the plaintiffs in the Chancery action were creditors within section 9 of the Bankruptcy Act, 1883 (now section 7 of the present Act), but were not secured creditors within subsection (2), and that the county court judge was right in refusing to discharge the order. But in that case, as in the case of *In re Pollard, Ex parte Pollard*[16] referred to above, the creditor was in a position to prove in the bankruptcy, and section 1 of the Bankruptcy Act covered his claim. The wife in the present case is not in a position to prove, and if she is (as she clearly is) entitled to enforce her claim by committal, there seems no good reason why she should not also be entitled to enforce it by a writ of sequestration, there being no question that that is an appropriate remedy to enforce an order for alimony or maintenance. (*Capron* v. *Capron*,[17] and Matrimonial Causes Rules, r. 62.[18])

---

[12] (1885) 15 Q.B.D. 239.

[13] [1894] 1 Q.B. 25.

[14] [1897] 2 Q.B. 439; 13 T.L.R. 534.

[15] 61 L.J.Q.B. 654; 8 T.L.R. 683.

[16] [1903] 2 K.B. 41.

[17] [1927] P. 243; 43 T.L.R. 667.

[18] Matrimonial Causes Rules, 1950, r. 62 (1): "In default of payment "to any person of any sum of money "at the time appointed by any order "of the court for the payment there-"of, a writ of fieri facias, sequestra-"tion, or elegit shall be sealed and

I was also referred, by counsel for the wife, to *Bendall* v. *McWhirter*,[19] and, in particular, to the judgment of Romer L.J.[20] That was the case of a deserted wife of a bankrupt, in occupation of the matrimonial home, and the question was the right of the trustee to possession. Romer L.J. said [21]: "The debtor's "right of dealing with the property was subject to the clog or "fetter that the house had an occupant whom he could not, "of his own volition, eject, and there was accordingly to this "extent a restriction on his beneficial ownership of the property. "If the trustee after the bankruptcy could sue the wife for "possession, it could only be on the footing that the property "vested in him free from this restriction, and it would follow "from this that he acquired a larger beneficial interest in the "property than that which the debtor had previously enjoyed. "It would also follow that a third person automatically lost a "special feature attaching to a licence which the debtor had "granted for value, and was relegated to the position of an "ordinary licensee; and that the deterioration of that person's "position and the improvement of the trustee's would be com-"mensurate in relation to each other. Mr. Heathcote-Williams "argued . . . that these were the necessary and natural results "of the bankruptcy law. What is vested in the trustee, he said, "was the freehold of the property, and (apart from the mort-"gagee) nobody but the debtor had any legal or equitable "interest in that property. The wife's licence depended on her "husband's ownership of the property and could not survive "the vesting thereof in the trustee. This vesting carried with "it (under s. 22 of the Bankruptcy Act) the right to posses-"sion, and the passing of that right was destructive of licences "that had been previously granted by the debtor. In this "connexion Mr. Heathcote-Williams relied on a principle which "has been recognized in *Brown* v. *Draper* [22] and other cases, "namely, that a wife cannot claim the benefit of her husband's "statutory tenancy after his interest as statutory tenant has been "validly determined. That, of course, is true; every subordinate "interest must perish with the superior interest on which it is "dependent. The argument, however, does not appear to me to

---

"issued as of course out of the "Divorce Registry upon an affidavit "of service of the order and of non-"payment."

[19] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[20] [1952] 2 Q.B. 466, 485.

[21] Ibid. 486.

[22] [1944] K.B. 309; 60 T.L.R. 219; [1944] 1 All E.R. 246.

"be convincing. The superior interest in the present case was "the ownership of the house, and that has not been extinguished; "it is still alive and is vested in the trustee. The real point, as "I see it, is whether it became so vested subject to, or free from, "a particular incident which was attached to it in the debtor's "hands prior to the vesting. If it is now free from the bankrupt's disability to sue the wife for possession, the plaintiff's "action must succeed. This view, however, seems to me to "involve a departure from the general rule to which I have "already referred, that a trustee takes no better title to "property than the bankrupt had. This rule is fully and (I "think) accurately stated in Halsbury's Laws of England, "Vol. II, 2nd ed., at p. 209, as follows: 'The property of the "'bankrupt passes to the trustee in the same plight and con-"'dition in which it was in the bankrupt's hands, and is subject "'to all the equities and liabilities which affected it in the "'bankrupt's hands, and to all dispositions which have been "'validly made by the bankrupt, and to all rights which have "'been validly acquired by third persons at the commencement "'of the bankruptcy, unless the property which the trustee takes "'is released by some express provision of the bankruptcy law.'"

The position, therefore, may be summarized as follows: The writ of sequestration was issued before the act of bankruptcy in respect of the husband's contempt of court. It was in that "plight," therefore (to use the words quoted with approval by Romer L.J.), that the husband's property passed into the hands of the trustee. Under the writ a number of orders have been made authorizing payment over by the sequestrators to the wife, the last one giving general authority to make such future payments out of funds in their hands without the necessity for further order by the court. There is admittedly property to which the writ can attach, indeed it was intimated on behalf of the trustee that there was no objection to the writ remaining in existence if its operation was restricted to what counsel called the husband's "personal pay packet." Since the issue of the writ the husband has given a number of undertakings to the court in respect of it, in proceedings for his committal to prison. The husband is still in contempt. Apart from the fact that the contemner has been adjudicated bankrupt, which formed the ground for this application, no evidence has been adduced which could possibly form the basis of an application to discharge the writ. Finally, the writ was issued in respect of failure to comply

1956

COLES v. COLES.

Collingwood J.

with an order for payment in respect of which the wife cannot prove in the bankruptcy.

In these circumstances the applicant has not, in my opinion, shown good cause why the writ of sequestration should be discharged by this court. Nor do I think that there is ground for me to interfere in any way with the order made by Karminski J. on April 1, 1955, an order made, as it unquestionably was, with full knowledge of the facts as they existed at that date. As to the remaining part of the summons, asking that the trustee in bankruptcy of the husband be joined as a party to the cause, to such extent and for such purposes as may be just and expedient, this was not resisted by counsel for the wife, and I see no objection to it, and accede to it accordingly.

Solicitors: *Trustee in Bankruptcy; Evan Davies & Co.*

E. J.

1956 *Oct.* 22; *Nov.* 30.

Mr. Commissioner Temple Morris Q.C. (sitting at Cardiff).

BARNETT *v.* BARNETT. BROWN INTERVENING.

Husband and Wife—Adultery—Consent—Intervener aged 12 *years—Whether capable of adultery.*

A female child of 12 years of age is incapable of consent to sexual intercourse so as to render her guilty of adultery.

WIFE'S UNDEFENDED PETITION for divorce on the grounds of cruelty and adultery.

The husband had been convicted at Glamorgan Assizes on November 15, 1954, on his own confession on three counts charging him with having carnal knowledge of the infant intervener, being a girl under the age of 13 years. At the material time the intervener, who was a sister of the wife petitioner, was 12 years of age. The intervener, by her guardian ad litem, the Official Solicitor, denied the adultery.

The facts are fully stated in the judgment.

J. C. Rutter, for the petitioner, was not concerned to argue against the infant intervener.

P. L. W. Owen for the infant intervener. The depositions in the criminal proceedings, with the exception of the intervener's own deposition, are not admissible against her. [Reference was

---

[Reported by HYWEL AP ROBERT, Esq., Barrister-at-Law.]

made to Phipson on Evidence, 9th ed., at p. 19.] Her deposition is admissible as an admission against her interest. In the course thereof she twice says he "put his private in mine." That is the whole of the evidence against her. It is submitted that this will not suffice to prove her guilty of adultery.

A male under the age of 14 is conclusively presumed to be incapable of rape and of unlawful carnal knowledge: *Reg.* v. *Phillips*[1]; *Reg.* v. *Brimilow*[2]; *Reg.* v. *Waite*[3]; *Reg.* v. *Williams*.[4] Evidence of capacity will not be admitted. These rules are based on an irrebuttable presumption of incapacity for sexual intercourse, and in the absence of authority it is submitted that a female of that age is equally to be presumed incapable of it. Consent is a necessary element in adultery. A child of tender years can consent in fact to sexual intercourse: *Rex* v. *Harling*[5]; but it appears in the report of that case that tender years alone may be enough to rebut the inference of consent. It is conceded that where the fact of intercourse is proved against an adult person, the burden of proof shifts, so that proof of want of consent is upon that party: *Redpath* v. *Redpath and Milligan*[6]; but not, it is submitted, where the person charged is a child of tender years. It is contrary to the public interest that a wronged child should be branded as an adulteress. [Reference was also made to Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., at pp. 14, 15, 1090 and 1091; Latey on Divorce, 14th ed., at pp. 728 and 830–833.]

Cur. adv. vult.

November 30. Mr. Commissioner Temple Morris Q.C. This is a wife's petition on the grounds of cruelty, and adultery with a young girl who is the sister of the petitioner wife. The respondent entered an appearance, but did not appear at the hearing on October 22 or today. The infant intervener entered an appearance and delivered an answer denying adultery through her guardian ad litem, the Official Solicitor, who was represented at the hearing by Mr. Philip Owen.

The facts of the case can be stated quite briefly. The marriage took place on July 21, 1948, and there are three children. The parties lived at various addresses, eventually at Rumney and then at Ely. With regard to the first part of the married life the wife

---

[1] (1839) 8 Car. & P. 736.

[2] (1840) 9 Car. & P. 366.

[3] [1892] 2 Q.B. 600; 8 T.L.R. 782.

[4] [1893] 1 Q.B. 320; 9 T.L.R. 198.

[5] [1938] 1 All E.R. 307; 26 Cr. App.R. 127.

[6] [1950] 1 All E.R. 600.

1956

BARNETT
v.
BARNETT.
BROWN
INTERVENING.

Mr. Commissioner Temple Morris Q.C.

says she rarely saw her husband; he was constantly drunk, he was coming in at all hours and he upset her very much by saying that one of the children of the marriage was not his child. She left him because of his conduct and she was away from him for approximately 18 months. Then they moved to a house in Ely in the City of Cardiff and the same conduct continued. He was a man working delivering coal, and he would come home drunk and get into bed without bathing or cleaning himself, with all the coal dust over him. When the wife was pregnant her young sister Carol (who is the infant intervener) came to the house with the object of helping the wife with her domestic responsibilities, and it was during that time that the husband committed adultery with her. The husband was arrested, came home on bail, did not inform his wife that he had been arrested or that he was on bail, and just told her that he was leaving. He was committed for trial by the Cardiff City Magistrates, and on November 15, 1954, at the Glamorgan Assizes, on three charges of carnal knowledge, to which he pleaded guilty, he was sentenced to imprisonment for the period of three years on each charge, to run concurrently. The wife was not allowed to go to the court, she did not know the full facts, and she says she has not and never has forgiven him.

The charges to which he pleaded guilty were: Carnal knowledge of a girl under 13 years, between December 23, 1953, and July 31, 1954, and also carnal knowledge of a girl under the age of 13 years between July 1, 1954, and September 17 of the same year. And in order to make the sequence of dates complete, the child with which the wife was then pregnant died on January 6, 1955. The age of the infant intervener at the material time was a little over 12 years, as her date of birth (which has been strictly proved from the mouth of her own mother) was on December 21, 1941.

On those facts four questions arise: (1) Is there evidence that the respondent husband has committed adultery with the infant intervener? (2) Is there evidence of cruelty against the respondent husband? (3)—and this is possibly the most important question of all—Can a female infant intervener of 12 years of age be found guilty of adultery? If not, that is the end of the matter so far as she is concerned; but if yes, then there is a fourth question: Is there evidence upon which the infant intervener can be found guilty of adultery with the respondent husband?

1956

BARNETT
v.
BARNETT.
BROWN
INTERVENING.

Mr. Commissioner Temple Morris Q.C.

With regard to those four questions. (1) Is there evidence that the respondent husband has committed adultery with the infant intervener? The answer to that is: Yes, the clearest possible evidence—his own plea of guilty at his trial and his own confession which was produced in evidence.

(2) Is there evidence of cruelty against the respondent husband? My answer to that question is: Yes, there is evidence of cruelty in his conduct, which has been systematic, which has obviously been aimed at his wife, and which can be compared with *Ivens* v. *Ivens*.[1] The cruelty relied upon in that case was indecent conduct to a stepdaughter, and here part of the cruelty relied on is carnal knowledge of an infant sister. In regard to that case, Lord Goddard C.J., when he was sitting in appeal on that case, used these very significant words[2]: "I can imagine "nothing which would be more likely to affect the woman's "health, as in fact it did . . ." Therefore, without any further examination of the facts, there is evidence of cruelty against the respondent husband.

(3) Can an infant intervener of 12 years be found guilty of adultery? So far as I know this point has never yet been decided. There is no direct authority upon it. I am very grateful to Mr. Philip Owen for his most helpful argument and I have followed that argument up and, as he did, I have made very thorough investigation and I, as far as my researches go, can find no direct authority upon it. It appears to me, therefore, that the matter has not been definitely decided. The question is: Can an infant intervener of 12 years be found guilty of adultery? My answer to that question is: No, she cannot. The reasons which have led me to this conclusion are reasons arrived at by processes of comparison and analysis. For the purposes of relief in the Divorce Division adultery may be defined as "consensual sexual inter-"course between a married person and a person of the opposite "sex during the subsistence of the marriage." I take that definition from Rayden on Divorce, 6th ed., p. 111, and for my purposes the most important word is "consensual," and "consensual" obviously means "by consent." All through legal development the law highly regards consent, and consent can only be given by those eligible to give it, that is to say, by people who are not legally disqualified by age from so doing. And for the purposes of analysis one looks at the Marriage Acts, 1929 and 1949. The age of consent to marriage was raised to 16 for

---

[1] [1955] P. 129; [1954] 3 All E.R. 446.

[2] [1955] P. 129, 132.

either male or female, and a marriage under that age was made void, and I do stress for the purposes of comparison the word "void" and not "voidable." Therefore, it follows that if by some chance or other this young girl had gone through a ceremony of marriage that marriage would have been void.

I proceed a stage further. A woman who is raped is not guilty of adultery. Obviously, because an essential part would be omitted—it would not be consensual, it would not be by consent. I refer to *Redpath* v. *Redpath and Milligan*,[3] and Bucknill L.J. in that report laid great stress on the word that adultery must be a "consensual" act. One follows it on from there and develops it a stage further: that in addition to a woman who is raped not being guilty of adultery, a boy of 14 cannot commit rape. In *Reg.* v. *Waite*,[4] a male under the age of 14 cannot be convicted under section 4 of the Criminal Law Amendment Act, 1885, of the offence of carnal knowledge of a girl under the age of 13 years. And I take that a stage further to note that whereas that is still good law, and is a most important authority so far as boys are concerned, it must be read with the reservation of *Reg.* v. *Williams*[5] that a boy under the age of 13 may be convicted of indecent assault.

Arriving at that point, that a boy of 14 cannot be convicted of rape, I ask myself this question by way of comparison: Why should a boy be placed in a more favourable position than a girl? I appreciate that which has to be taken into consideration, which was stressed very strongly in *Rex* v. *Harling*,[6] where Humphreys J. said[7]: "while a girl under the age of 16 is perfectly capable "of consenting, and, as everyone knows who tries these cases, "frequently does consent to an act of sexual intercourse with a "man, the law has provided that such consent offers no defence "to a man on a charge of carnal knowledge of a girl under 16."

Bearing those points in mind, it seems to me that it would be very illogical to say that a girl of the age of 12 years who went through an act of sexual intercourse to which she was ineligible and disqualified from giving her consent, and in respect of which the man who perpetrated upon her this foul act is now in prison, was guilty of adultery. In my view she cannot be found guilty of adultery. To do so would be to make a decision against sound sense, good decency and morality. I go so far as to say this, that to find a girl of 12 guilty of adultery would be highly against public interest. It is most undesirable that a young girl of 12 years of age, in these circumstances, should live the rest of her life branded as an adulteress when she had no legal voice or acquiescence in the criminal deed which was perpetrated upon her.

---

[3] [1950] 1 All E.R. 600.

[4] [1892] 2 Q.B. 600; 8 T.L.R. 782.

[5] [1893] 1 Q.B. 320; 9 T.L.R. 198.

[6] [1938] 1 All E.R. 307; 26 Cr. App.R. 127.

[7] 26 Cr.App.R. 128.

In the event of my being wrong upon that, the fourth question is: If she can be—I hold that she can not—but if she can, is there evidence upon which the infant intervener can be found guilty of adultery with the husband? My answer to that is: No, there is not. There are in her statement two material passages only, and in order that they may form part of the judgment I am reading them without any comment. The first sentence by her is: "When they were out we would sometimes do the business. He would put his private into my private." And then, at the end of her statement: "He opened the front of his trousers and put his private in mine." Those are statements, obviously, against interest. They are the only statements which are evidence against her. The evidence against the husband is one thing and the evidence against the girl intervener is another. When I ask myself the question "What evidence is there against the infant intervener?" there are only these two meagre statements. The courts do not like to act on confessions. One does look round for corroboration and in my view the case for adultery, resting on those two statements only, falls far short of the standard required before a person can be found guilty of adultery.

The wife is in discretion. Her discretion statement has been considered, and all I need say, without any further comment upon that, is that it is a proper case to grant her discretion. I grant a decree nisi to the wife on the grounds of her husband's cruelty and on the grounds of her husband's adultery, with costs against the husband. The infant intervener is dismissed from the suit, with costs against the husband.

Decree nisi.

Solicitors: *F. C. J. Elias, Cardiff; Official Solicitor.*

THE CORCHESTER.

1956
Oct. 29,
30, 31;
Nov. 1, 16.

Lord Merriman
P. and
Willmer J.

Shipping—Court of formal investigation—Jurisdiction—Suspension of officer's certificate—Findings necessary to found jurisdiction—Form of report in quasi-penal proceedings—Report subsequently amended after reading in open court—Effect of amended report—Slip rule —Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 466, 470.
Natural Justice—Tribunal—Notice of decision.

The appellant was the master of the s.s. *Corchester,* which sank as a result of a collision with another vessel. A court of formal investigation was constituted under section 466 of the Merchant Shipping Act, 1894, to inquire into the circumstances of the collision. The decision of the court, which was contained in the report, the questions and answers, and the annex to the report, was read in open court as required by section 470 (2) of the Merchant Shipping Act, 1894. In the decision as read, the commissioner recommended in the report that the master's certificate of the appellant be suspended, but in the annex thereto suspended the appellant's certificate. The report did not contain a finding that the collision was caused by the wrongful act or default of those navigating either vessel. The full report was forwarded to the Minister of Transport and Civil Aviation. Subsequently the Treasury Solicitor's representative pointed out to the commissioner the discrepancy between the report and the annex, and the latter altered the report to suspend the appellant's certificate instead of recommending a suspension, and inserted in the report a finding that the collision was caused by the fault or default of those in charge of both vessels. The alterations were made without notice to the appellant or his legal advisers and the amended report was forwarded to the Minister without being read as amended in open court. The Divisional Court found, on the advice of their assessors, that the criticisms of the appellant contained in the annex were not such as to warrant a finding of wrongful act or default on the part of the appellant:—

Held, (1) that although section 466 (10) of the Merchant Shipping Act, 1894, gave to a court of formal investigation the powers of a court of summary jurisdiction, which included the power to correct an accidental slip or omission in its order, the alterations in the report were not such as to come within that rule.

(2) That the report as amended must be disregarded, since it had not been read in open court, as required by section 470 (2) of the Merchant Shipping Act, 1894, and also because the alterations therein had been made without notice to the appellant.

(3) That the findings contained in the annex of the original report could not override those contained in the report itself, and, even if both documents were to be read together, the decision was ambiguous and as such was insufficient, since the court was exercising a quasi-penal jurisdiction and was thus under a duty to state its decision in the clearest possible terms.

Held, further, that section 470 (1) (*a*) of the Act of 1894 required that, to found jurisdiction to cancel or suspend the certificate of an officer, there must be a finding that the casualty was caused by the wrongful act or default of the holder of the certificate; that, while it was desirable that such finding should be expressly contained in the report, the fact that it was only contained in the annex did not vitiate the decision, provided the decision to suspend was stated in the report; but that the commissioner had no jurisdiction to suspend the appellant's certificate, since neither the report nor the annex contained any specific finding of wrongful act or default on the part of the appellant.

Inland Revenue Commissioners v. *Hunter* [1914] 3 K.B. 423 applied.

Where an officer's certificate is ordered to be suspended there should be express findings (*a*) that he was guilty of a specific wrongful act or default, and (*b*) that the casualty was caused or contributed to thereby.

APPEAL from the decision of a court of formal investigation constituted under section 466 of the Merchant Shipping Act, 1894.

A court of formal investigation, consisting of a commissioner assisted by two assessors, inquired into the circumstances attending the collision between the *Corchester* and the *City of Sydney* which occurred on February 19, 1956. The court suspended the certificate of the master of the *City of Sydney* and the mate's home trade certificate of the second officer of the *Corchester* for 12 months, and purported to suspend the master's certificate of the master of the *Corchester* for three months.

The master of the *Corchester* appealed on the grounds, inter alia, that the decision of the court did not have the effect of suspending his certificate, and that if it did there was no jurisdiction to do so.

H. V. Brandon for the appellant.

J. V. Naisby Q.C. and *G. N. W. Boyes* for the Ministry of Transport and Civil Aviation.

Two assessors sat with the court.

The arguments of counsel material to this report appear in the judgment, save that counsel for the appellant further submitted that the appeal should be allowed on the ground that the charges against the appellant were never properly formulated or put to him in cross-examination. It was also submitted that the appeal should be allowed on the further ground that counsel for the appellant was deterred from developing in full his argument in relation to the appellant's absence from the bridge by observations of the commissioner; and also on the ground that, in an inquiry under the Merchant Shipping Act, 1894, counsel is entitled to rely on the Ministry outlining the case against his client, and that at this hearing counsel for the Ministry intimated that he was instructed by the Minister not to press for any action to be taken with reference to the appellant's certificate.

The following cases and textbooks were cited in argument: Temperley's Merchant Shipping Acts, 5th ed., pp. 298, 299, 301 and 309; McMillan's Shipping Inquiries and Courts, pp. 28, 29, 45, 46, 110 and 112; The Annual Practice, 1956 ed., p. 465; *The Arizona* [1]; *The Kestrel* [2]; *Ewer* v. *Board of Trade* [3]; *MacCarthy* v. *Agard* [4]; *Mordue* v. *Palmer* [5]; *Inland Revenue Commissioners* v. *Hunter* [6]; *Sutherland & Co.* v. *Hannevig Brothers Ltd.* [7]; *Cooper* v. *Cooper* [8]; *In re Polemis and Furness Withy & Co. Ltd.* [9]

Cur. adv. vult.

Nov. 16. LORD MERRIMAN P. The judgment which Willmer J. will read is the judgment of the court.

WILLMER J. This is an appeal by Captain Ernest George Northcott, the master of the steamship *Corchester*, against the decision of a court of formal investigation, constituted under section 466 of the Merchant Shipping Act, 1894, to inquire into the circumstances attending a collision between the *Corchester* and the steamship *City of Sydney*, which occurred in the vicinity of the Haisborough light vessel in the early morning of February 19, 1956. In consequence of the collision the *Corchester* sank, with the loss of eight lives. The court, which consisted of a commissioner assisted by two assessors, found—according to the report embodied in the record before us—that the collision was caused by the fault or default of those in charge of both ships, and suspended the master's certificate of the master of the *City of Sydney* and the mate's home trade certificate of the second officer of the *Corchester* for a period of 12 months. The court also suspended the appellant's master's certificate for a period of three months.

---

[1] (1880) 5 P.D. 123.

[2] (1881) 6 P.D. 182.

[3] (1880) 7 R. (Ct. of Sess., 4th series) 835.

[4] [1933] 2 K.B. 417.

[5] (1871) L.R. 6 Ch. 22.

[6] [1914] 3 K.B. 423.

[7] [1921] 1 K.B. 336; 37 T.L.R. 102.

[8] [1940] P. 204; 57 T.L.R. 49; [1940] 3 All E.R. 579.

[9] [1921] 3 K.B. 560; 37 T.L.R. 940.

This appeal concerns only the suspension of the appellant's certificate. There has been no appeal by the master of the *City of Sydney*, nor by the second officer of the *Corchester*, who were respectively the officers in charge of the navigation of the two ships at the material time. During the material period preceding the collision the appellant was not on the bridge of his ship, having gone below for the purpose of relieving himself and having tea some 25 minutes before the collision. He only returned to the bridge a few seconds before the collision. The appellant, therefore, had no part in the navigation of his ship during the material time, having left the second officer in sole charge. In these circumstances it does not appear necessary to describe in detail the manoeuvres of the two ships which led to the collision, and the following summary will suffice.

The *Corchester* was proceeding in a north-westerly direction, in the course of a voyage from Erith to West Hartlepool in ballast. The *City of Sydney* was proceeding in a south-easterly direction, in the course of a voyage from Middlesbrough to Newport, also in ballast. The visibility on the morning of the collision was variable, due to intermittent snow flurries. At the time when the appellant left the bridge of his ship to go below it was relatively clear, but at the time of the collision the visibility had closed in, due to snow, and was no more than about a quarter of a mile. In spite of the poor visibility both vessels were proceeding at full speed until after they sighted each other. Both were equipped with radar, and in each case the echo of the other was observed when the ships were still a considerable distance apart. The second officer of the *Corchester* observed that the echo of the *City of Sydney* remained on a constant bearing; but he took no steps to alter either the course or speed of his ship. He did not sound any fog signals, and heard none from the *City of Sydney*, though the latter was found by the court to be sounding. After the echo of the *City of Sydney* had been observed to approach nearer, the second officer of the *Corchester* twice endeavoured by means of the voice-pipe to summon the appellant to the bridge; but he obtained no reply, because the voice-pipe connected only with the master's cabin, whereas the appellant was in the saloon. At the last moment—just before the vessels sighted each other—he sent the steward, who had appeared on the bridge with tea, to find the appellant. After the vessels sighted each other the *Corchester* turned to port under port wheel, and sounded two short blasts; the *City of Sydney* turned to starboard under starboard wheel. Both vessels worked their engines full speed astern, but the collision nevertheless happened, the *City of Sydney* with her stem striking the starboard bow of the *Corchester* with considerable force at a broad angle. The first that the appellant knew of any trouble was when he heard the signal of two short blasts sounded by his vessel. Upon hearing this he rushed up on the bridge, and arrived just as the collision was about to take place.

The deck watch on board the *Corchester* consisted of the officer of the watch (in this case the second officer) and three men. Of these three men one was at the wheel; one was supposed to be on the look-out on the forecastle-head, and was so thought by the appellant to be, but apparently unknown to the appellant he had gone off watch at daybreak; the third man was the stand-by man, but he was not on the bridge, and was thought to be in the galley. At the material time, therefore, the second officer and the helmsman were the only persons on deck.

The material portion of the annex to the report which deals with the appellant's conduct is in the following terms: "The "court is of the opinion that the second officer of the *Corchester* "should not have been left without any assistance in the "matter of radar observation, of keeping look-out, of sounding "any necessary fog signals and of seeing that the course was "maintained. There should have been a look-out posted on the "forecastle and there should have been a man readily available "to send for the master. The master had gone below at about "0700 hours, whilst the visibility, though low, was sufficient. "Unfortunately, he remained below and not in touch with the "voice-pipe in his cabin and although the second officer, at a "late moment, blew down that voice-pipe on two occasions and "finally sent the steward, who had appeared on the bridge "with tea, the master's first information of anything unusual "was the hearing of his ship's helm signal; whereupon he came "on the bridge, arriving just before the collision.

"The evidence gave the impression that the discipline maintained on the *Corchester* was lax and that her master ought "to have seen that so long as he was below there was somebody "who could be instantly sent for him and, in the uncertain "visibility due to passing snow showers, the master should "have been more on the alert. In spite of the submissions of the "Ministry of Transport and Civil Aviation the court finds itself "unable merely to censure the master for his indirect contribution to this casualty, and suspends his certificate for three "months from the date of the collision."

When the appeal was opened before us our attention was immediately drawn to what, in our judgment, can only be described as a grave irregularity on the part of the commissioner in the preparation and publication of the report. Section 470 (2) of the Act provides: "Where any case before any such court "as aforesaid involves a question as to the cancelling or "suspending of a certificate, that court shall, at the conclusion "of the case or as soon afterwards as possible, state in open "court the decision to which they have come with respect to "the cancelling or suspending thereof."

Following the usual practice, the commissioner complied with this requirement by reading out in open court the whole of the report, the questions and answers, and the annex to the report. We were informed, however, that the report and the annex, as originally drafted and as read out in court, differed in material respects from the report and annex as they are now before us, and as they were in due course published by H.M. Stationery Office. In particular, the report, as read out, contained no finding that the collision was caused by the fault or default of those in charge of both ships. Moreover, the last sentence of the report—which deals with the certificate of the appellant—was in the following terms: "It (the court) further recommends "that the master's certificate of Captain Ernest George North-"cott be suspended for three months from the date of the "collision."

In this respect there was a discrepancy between the report, as read out, and the annex, which in this respect was in the same terms as are now before us, and which stated that the court suspended the appellant's certificate for three months. There were other discrepancies, not material to this appeal, between the report and the annex as they were read out and as they now appear.

By section 470 (1) (*a*) of the Act a court holding a formal investigation into a shipping casualty is empowered, "if the "court find that the loss . . . any ship . . . has been caused "by his wrongful act or default," to cancel or suspend the certificate of a master. No provision is made for the court making any recommendation for the cancellation or suspension of a certificate, and no machinery is provided enabling the Ministry or any other authority to act upon any such recommendation.

Upon the report being sent to the Ministry by the commissioner, as required by section 470 (3) of the Act, the Treasury Solicitor's representative having conduct of the case immediately

1956

THE CORCHESTER.

conceived a doubt as to the validity of the report, so far as it concerned the appellant, having regard to the fact that it contained no operative order for the suspension of the certificate, but merely a recommendation on which the Ministry was powerless to act. He, therefore, called upon the commissioner privately and pointed out the difficulty. After discussion the commissioner decided to meet the difficulty by amending the terms of the report. This he proceeded to do, making various alterations to the wording of both the report and the annex, including the two material alterations to the report itself, to which reference has already been made. He then caused the whole to be re-typed and re-signed by himself and the two assessors, and forwarded the new and amended report to the Ministry. This latter is the document which was subsequently published by the Ministry and is contained in the record before us. The correspondence which passed between the commissioner and the Treasury Solicitor's representative has been placed before us, and from this it appears that the commissioner took the view that he was fully entitled to alter the wording of the report so as to clear up a possible ambiguity. It remains to add that the interview between the commissioner and the Treasury Solicitor's representative took place, and the alterations to the report and annex were made, without notice to, and without the knowledge of, the appellant or his legal advisers, and before notice of appeal was given. It is true that after notice of appeal was given it occurred to the representative of the Treasury Solicitor, as is shown by his letter of August 9, to doubt the propriety of making any alteration at that stage. We think that the propriety was equally open to doubt at the earlier stage, but the fact that notice of appeal had been given did at least afford an opportunity, which was not taken, of bringing the matter to the notice of the appellant.

It is to be observed that, as regards the master of the *City of Sydney*, whose certificate was suspended for 12 months from the date of the collision on the face of the report itself, the annex as read in court reads: "The court recommends that his certificate "be suspended for 12 months from the date of the accident," which has been altered in the record before us to read "suspends" instead of "recommends." We find ourselves unable to accept the view expressed in the letter of July 25 from the commissioner to one of the assessors that any of these alterations can be described by any stretch of language as either "minor corrections" or "slight alterations."

Upon these facts being brought to our attention we thought it right to grant leave to amend the notice of appeal, so as to raise the question whether there ever was a valid order suspending the appellant's certificate. It was argued on the one side that the decision, and the only decision, of the court in relation to the appellant was that contained in the concluding sentence of the report; that, since this contained no valid order for the suspension of the appellant's certificate, it was of no effect; and that the commissioner, having stated the decision in open court, and having once submitted his report to the Ministry, was functus officio and had no jurisdiction to amend its terms, and certainly not behind the back of, and without notice to, the appellant. On behalf of the Ministry it was contended that the decision of the court was to be collected, not from the report alone, but from the report and the annex together, both of which were read in full in open court; that, upon a fair reading of the two documents taken together, it was the plain intention of the court to suspend the appellant's certificate; and that in these circumstances the commissioner was not acting outside his powers in altering the wording of the report and annex, so as to make plain what had always been the intention of the court.

It should be made plain at once that no lack of bona fides, on the part of either the commissioner or the Treasury Solicitor's representative, has been suggested. At the same time we are abundantly satisfied that the action of the commissioner in altering the wording of the report, after the decision had been stated in open court, was improper and without jurisdiction. We do not accept the contention that, even in its original form, the report, when read in conjunction with the annex, showed a manifest intention on the part of the court to order the suspension of the appellant's certificate. On the contrary, we think the true inference is that the commissioner made a mistake of law, in that when preparing the original report he had not in mind what were the exact duties and powers of the court, as defined by section 470 (1) (*a*) of the Act, in relation to suspension of a certificate. So far as the High Court is concerned, the power to amend the wording of an order once made, whether under Ord. 28, r. 11, or under the inherent jurisdiction of the court, is strictly limited. The principles on which the High Court acts are stated in the Annual Practice, in the notes to R.S.C. Ord. 28, r. 11, at p. 465 of the 1956 edition, in words which were expressly approved by Greer L.J. in *MacCarthy* v.

Agard,[1] as follows: " 'The error or omission must be an error in " 'expressing the manifest intention of the court; the court cannot " 'correct a mistake of its own in law or otherwise, even though " 'apparent on the face of the order, such as a mistake due to a " 'misunderstanding of a rule or statute. If the order as drawn " 'correctly expressed the intention, it cannot be corrected under " 'this rule or the inherent jurisdiction, even if the decision of the " 'court is procured by fraud or misrepresentation.' " Similarly, the power of an arbitrator to alter the wording of an award once published is limited to the correction of an accidental slip or omission—see section 17 of the Arbitration Act, 1950. *Sutherland & Co.* v. *Hannevig Brothers Ltd.*[2] furnishes a good illustration of what an arbitrator has no jurisdiction to do.

In this case, however, we are dealing with the decision of a tribunal whose jurisdiction is wholly statutory, and unless what the commissioner did can be shown to be within the four walls of the statute he could have no jurisdiction. It is true, as has been pointed out to us, that a court holding a formal investigation under the Merchant Shipping Act, 1894, is given, by section 466 (10), all the powers of a court of summary jurisdiction. It is further true that a court of summary jurisdiction has the power to correct an accidental slip or omission in any order made by it—see *Cooper* v. *Cooper*.[3] But it has not been, and could not be, suggested that its powers extend beyond that. What, in our judgment, it is vital to observe is that, in the case of a court holding a formal investigation, the procedure for announcing the decision and submitting the report is expressly laid down by the provisions of the enabling statute. Attention has already been drawn to the words of section 470 (2), which provide that in case of suspension of a certificate the decision must be stated in open court; but it is not unimportant to bear in mind also the provisions of subsection (3), which provides for the sending to the Ministry of a full report on the case. No provision is made for submitting an amended or corrected report to the Ministry; and no decision to suspend or cancel a certificate is valid unless stated in open court. The report, in its present amended form, has never been read in open court, and the only decision stated in open court was that contained in the report in its original form.

---

[1] [1933] 2 K.B. 417, 424.

[2] [1921] 1 K.B. 336; 37 T.L.R. 102.

[3] [1940] P. 204, 213; 57 T.L.R. 49; [1940] 3 All E.R. 579.

This alone, in our judgment, is sufficient to justify the conclusion that the report in its present amended form, as far as it concerns the appellant, must be totally disregarded. If there is any room for doubt, we think that such doubt is removed when it is remembered that the alterations to the original report were made behind the back of, and without notice to, the appellant or his advisers. In *Inland Revenue Commissioners* v. *Hunter*[4] Scrutton J. said: "I think it right to say that the well-known "rule that no communication shall be made by one party to a "judicial tribunal without the knowledge of the other party is "of the greatest importance, and should be strictly observed. "This is especially so where the communication leads to the "alteration of an existing award, and is made orally, so that "no record of what it was exists. While, as I have said, no "improper motive is imputed to the subject's solicitors, I think "their action was a breach of a well-established rule of great "importance, and, as such, most regrettable." The principle there stated applies with full force to what was done in the present case. The failure to give notice to the appellant's advisers was all the more regrettable, having regard to the fact that, as appears from the letter from the Treasury Solicitor's representative to the commissioner of August 8, 1956, it was known before the amended report was published that this appeal had been lodged.

For these reasons we are satisfied that the report in its present amended form must be totally disregarded, and this appeal must be treated as an appeal from the decision contained in the original report, as read in open court, and as originally submitted to the Ministry. The question then arises whether, in view of the terms of that report, there ever has been any valid suspension of the appellant's certificate. The report, which is in the statutory form provided by the Shipping Casualties and Appeals and Rehearings Rules, Appendix I, No. 3, purports to set out the findings and decision of the court. It is true that the form provides that the report shall be accompanied by an annex, but it is plain from the introductory wording of the printed form of the report that the primary purpose of the annex is to set out in detail the reasons for the findings. In saying this we are not losing sight of the fact that the instructions on the form require it to be stated in the annex, inter alia, whether the certificate of any officer is suspended, and if so for what reasons. This does not, however, in our judgment, militate against the view that the report itself is intended to be the governing document. The commissioner, having read the report in open court, sufficiently discharged the duty laid upon him by section 470 (2) of the Act of stating the decision to which the court had come. Although it is customarily done, there was no obligation on his part to read the whole of the annex in open court. In such circumstances we do not see how anything said in the annex can be relied on for the purpose of contradicting the plain words of the report itself. This view is, we think, confirmed by the decision in *The Kestrel.*[5] The report in that case set out, in an exemplary way, a precise statement of the wrongful acts and defaults found against the master, on the strength of which his certificate was suspended. It was complained, however, that the reasons for the decision, as contained in the annex to the report which was subsequently published, differed from those which had been stated verbally in court at the time when the decision was announced and the report read. It was held that this circumstance was immaterial, since the court was at liberty, when submitting the report and annex to the Ministry, to give different reasons for its decision from those which had been announced in court.

---

[4] [1914] 3 K.B. 423, 428.

If we are wrong in our view that the report itself is the governing document, and must be taken to override any contrary expressions contained in the annex, and if it be right that the report and annex must be read together in order to ascertain the decision of the court, the only result is that the decision is ambiguous. We should not in any event think it right that an officer should receive the punishment of having his certificate suspended on the strength of an ambiguity. It is to be remembered that a court holding a formal investigation is exercising a quasi-penal jurisdiction, and for that reason, if for no other, is under a duty to state its decision in the clearest possible terms. It follows, therefore, that whether the report is read by itself, or whether it is read in conjunction with the annex, we are unable to find that there has ever been any valid order suspending the appellant's certificate. On that ground alone the appellant is entitled to succeed on this appeal.

Apart from this, however, it has been further argued that, even if the report be read as containing any clear decision to suspend the appellant's certificate, such decision is vitiated by the absence of any clear finding that the loss of the *Corchester* was caused by any wrongful act or default on the part of the appellant. It is contended that by the clear words of section 470 (1) (*a*) of the Act it is only upon such a finding that a court holding a formal investigation has jurisdiction to suspend a certificate. It is not without interest to observe that the report, as originally worded, contained no express finding of wrongful act or default on the part of anybody. When, however, the report was amended, a finding was inserted that the collision was caused by the fault or default of those in charge of both ships, no doubt because it was considered that such a finding was desirable in order to support the orders for suspension in the case of the master of the *City of Sydney* and the second officer of the *Corchester*. We entertain no doubt that the expression "those "in charge of both ships" was intended to refer to the officers respectively in charge of the navigation of the two ships. Neither in its original nor in its amended form does the report contain any express finding that the collision was caused by wrongful act or default on the part of the appellant.

---

[5] (1881) 6 P.D. 182.

On the other side it was urged that, in spite of the absence from the report itself of any express finding against the appellant, it is sufficient if such a finding appears from the report and annex when read together. The paragraphs of the annex in which the conduct of the appellant was reviewed have already been read, and it was argued that the criticisms of his action therein contained amounted to a sufficient finding of wrongful act or default on his part causing or contributing to the collision.

Counsel for the appellant, in presenting his argument on this aspect of the case, submitted, rightly in our view, that the problem must be broken down into three separate questions, as follows: (1) In order to found jurisdiction to suspend the appellant's certificate must there be a finding against him that the casualty was caused by his wrongful act or default? (2) If so, must such finding be stated expressly in the report itself, or is it sufficient that it is contained only in the annex? (3) If the latter, does the annex contain a sufficient finding (a) that there was a wrongful act or default on the part of the appellant, and (b) that such wrongful act or default was a cause of the casualty?

As to question (1), we entertain no doubt that the answer must be in the affirmative. In our judgment the only possible construction of section 470 (1) (*a*) of the Act is that a court holding a formal investigation has jurisdiction to suspend a master's certificate only upon a finding that the casualty was caused by his wrongful act or default. This point was discussed, but not decided, in *The Arizona*,[6] to which our attention was called. In that case there was at least some doubt as to whether there was any finding by the court that the casualty was caused by wrongful act or default on the part of the master. But it was unnecessary to determine this question, since the appeal succeeded on the ground that, even assuming there was such a finding, the evidence in the case was not such as to justify it. In the course of his judgment in that case the learned President said[7]: "Although I have said that we do not think it necessary to determine that question of law now, yet it is undoubtedly worthy of observation that neither in the formal report, nor in the reasons for it which have been given, does the learned judge state anything from which it can be inferred that he entertained the opinion that the default of the master was the cause of the casualty." From this we think it can be inferred that, had it been necessary to decide the point in that case, the learned President would have decided, as we do, that the suspension of a certificate can only be supported upon a finding that the casualty was caused by wrongful act or default.

With regard to question (2), while we think it desirable that, where an officer's certificate is suspended, the report itself should contain an express finding that the casualty was caused by a wrongful act or default on his part, we are of opinion that, provided the actual decision is stated in the report, the fact that the finding on which it is founded is contained only in the annex could not possibly be held to be a sufficient reason for upsetting the decision.

It is necessary, therefore, to consider closely the answer to question (3), namely, whether in this case the annex to the report does contain a sufficient finding against the appellant to justify the suspension of his certificate. The material paragraphs of the annex have already been read, and we think it right to say at once that in our view the findings against the appellant have been stated in a most unsatisfactory manner. Having regard to the quasi-penal nature of this jurisdiction it is most important that, where an officer's certificate is ordered to be suspended, there should be express findings in the clearest possible terms (a) that he was guilty of a specific wrongful act or default, and (b) that the casualty was caused or contributed to thereby. It cannot be right to state the criticisms of an officer's conduct in such vague terms as to leave it in doubt whether a finding that the casualty was due to his wrongful act or default is to be spelled out of the words used. In this case the material paragraphs of the annex are so worded as to give rise to just such a doubt. The paragraph in which the criticisms against the appellant are summarized begins with the words "The evidence gave the "impression"—not, we think, a very happy way in which to introduce what is said to be a finding of wrongful act or default. Similarly, to say that the appellant's certificate is to be suspended "for his indirect contribution to this casualty" is, to say the least of it, an unfortunate way in which to express a finding that the casualty was caused by his wrongful act or default. This expression was seized on by counsel for the appellant as meaning that there was in fact no causal connexion between the appellant's behaviour and the collision. Relying on the decision in *In re Polemis and Furness Withy & Co.*,[8] he contended that that which is indirect cannot in law be regarded as a cause at all, and on this ground alone he argued that the suspension of the appellant's certificate could not stand. We are not prepared to accede to this argument, for we do not think that a matter of this kind is to be determined by the attachment of a particular epithet to "cause": see *per* Lord Sumner in *British Columbia Electric Railway Co.* v. *Loach.*[9] At the same time, we do think it right to emphasize that, in a case such as this, where the actual manoeuvres leading to the collision were those of the second officer, and where the whole gravamen of the criticism of the appellant was that he was not there when he ought to have been, the circumstances were such as to call insistently for a specific finding as to whether the appellant's absence was a cause of the casualty. Furthermore, the criticisms made of the behaviour of the appellant, while indicating—if they are justified—some degree of dereliction of duty on his part, are not of such a kind as would necessarily or as of course justify a finding of wrongful act or default against him, so as to import penal, as opposed to civil, consequences. Here again, the circumstances were such as to call for a specific and clear finding whether the behaviour of the appellant did amount to a wrongful act or default.

---

[6] (1880) 5 P.D. 123.

[7] Ibid. 127.

Having made these comments on the way in which the findings of the court have been stated in the annex to the report we proceed now to consider whether it is possible to spell out from the criticisms made of the appellant's conduct a finding that the casualty was caused by his wrongful act or default, so as to justify the suspension of his certificate. Those criticisms, as we understand them, may be analysed as follows: The discipline maintained on board the *Corchester* was lax; from that resulted (1) the fact that no look-out was posted on the forecastle head when there should have been one, and (2) the fact that the master absented himself from the bridge for 25 minutes in doubtful visibility, without taking steps either (a) to ensure that means were readily available to summon him back to the bridge if required or (b) himself to remain on the alert for any alteration in the conditions.

---

[8] [1921] 3 K.B. 560; 37 T.L.R. 940.

[9] [1916] 1 A.C. 719, 727.

As to (1), it appears to have been conceded in the court below, and it was conceded before us, that the absence of a look-out on the forecastle head could not be regarded as a cause contributing to the collision, for the reason that, had such a look-out been posted, and had he heard the fog signals of the approaching *City of Sydney*, this would not have told the second officer in charge on the bridge any more than he already knew from his own observation of the radar. This point, therefore, disappears out of the case.

As to the second point, it has been assumed, and we are prepared to assume, that, had the appellant been on the bridge, he would not, with his experience, have made the same error in interpreting the radar observations as appears to have been made by the less experienced second officer. But when considering the propriety or otherwise of the appellant's absence from the bridge, we think that there is some force in the complaint made by counsel for the appellant that he was deterred from developing in full his argument on this point, having regard to the observations made by the commissioner in the course of the argument. Furthermore, it is right, we think, to bear in mind that the very faults in navigation of which the second officer was found guilty —namely, his failure to reduce speed and his failure to sound fog signals—are of themselves directly relevant to the question whether the appellant was sufficiently on the alert. Either a fog signal or a change in engine speed would immediately have called the appellant's attention to the fact that conditions had changed. As it was, his first information of anything unusual was, as is found, the hearing of his ship's helm signal—which came only after the ships had already sighted each other.

The question whether, in the particular circumstances, the appellant was justified in absenting himself from the bridge, and remaining out of touch with the navigating officer for so long, appears to us to be very largely one of seamanship, upon which we should be guided by the advice of the Elder Brethren. We have, therefore, sought their advice on this point. We wish to make it clear, however, that in doing so we have not thought it necessary to refer to the evidence, or to consider whether on the evidence the criticisms of the appellant's behaviour, as set out in the annex to the report, were justified. Our question to the Elder Brethren is based on the findings stated in the annex to the report, and for the purposes of the question we assume, without deciding, that those findings are justified. We have thought it right to reduce to writing both our question and the answer of the Elder Brethren thereto.

Our question is as follows: "On the basis that it is found "that the visibility was uncertain due to passing snow showers, "but that at the time the master left the bridge the visibility, "though low, was sufficient, and, having regard also to the following circumstances: (1) that his vessel was navigating in the "Would; (2) that there was no one on the bridge readily available "to send for him; (3) that he was not immediately in contact "with the voice-pipe in his cabin; and (4) that his first information of anything unusual was the hearing of his ship's helm "signal, whereupon he came on the bridge, arriving just before "the collision; was it unseamanlike conduct on the part of the "master to remain below in the saloon for a period of about "twenty-five minutes?"

To that question the Elder Brethren have returned the following answer: "No special precautions desirable because they "were in the Would for a ship engaged regularly on the coast. "Accepting the fact that there was no one on the bridge readily "available to send for him, and that he placed himself in a "position out of contact with the voice-pipe, in our opinion the "master by such action opens himself up to criticism in regard "to unseamanlike conduct. We consider the master was wrong "in remaining so long out of touch with the officer of the watch. "We feel that he was not seriously to blame when it is considered "this was a small ship and the ease with which any sound from "the bridge by either fog signal, mouth whistle or telegraph "would have reached him."

We accept unreservedly the advice tendered to us by the Elder Brethren, and on the basis of that advice we are satisfied

1956

THE CORCHESTER.

that on the findings of the commissioner the appellant would be open to some degree of criticism from the point of view of seamanship. At the same time it is plain that the Elder Brethren, even on the assumption of the commissioner's findings, are disposed to take a lenient view of any shortcomings on the part of the appellant. In this we agree. We wish to make it plain, however, that nothing in this judgment is to be taken as encouraging any relaxation of the principle that, unless compelled by unavoidable necessity, it is the duty of the master to be on deck at all times when the safety of the vessel requires his personal supervision: see *Ewer* v. *Board of Trade*.[10]

If, in spite of the lenient view of his conduct taken by the Elder Brethren, we were to find that wrongful act or default was established, we think there would be no doubt that it could be said to have caused, or at least to have contributed to, the collision, in the sense that the master's presence on the bridge would in all probability have prevented the mistakes made by the second officer. Even so, we should have felt ourselves unable to hold that a punishment of suspension of his certificate for three months was justified, particularly as counsel for the Minister was expressly instructed not to press for any suspension at all.

We revert, however, to the point that there is no specific finding of wrongful act or default on the part of the appellant, and we are not prepared as an appellate tribunal to make any such finding.

In the absence of such a finding there would not be, for reasons already given, any jurisdiction to suspend the appellant's certificate. On this ground also the appellant is entitled to succeed on this appeal.

Appeal allowed with costs.

Solicitors: *Ingledew, Brown, Bennison & Garrett; The Treasury Solicitor.*

A. S-R.

---

[10] (1880) 7 R. (Ct. of Sess., 4th series) 835.

TAYLOR (FORMERLY KRAUPL) *v.* NATIONAL ASSISTANCE BOARD AND ANOTHER.

C. A.

1956
Dec. 4, 19.

Denning and Hodson L.JJ. and Ormerod J.

Legal Aid—Disposable income—Subject matter of dispute—Order for alimony pending suit after application but before computation by National Assistance Board—Whether claim for alimony pending suit "the subject matter of the dispute"—Legal Aid and Advice Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *s.* 4 (3)—*Legal Aid* (*Assessment of Resources*) *Regulations*, 1950 (*S.I.* 1950, *No.* 1358), *reg.* 2—*Legal Aid* (*General*) (*Amendment No.* 1) *Regulations*, 1954 (*S.I.* 1954, *No.* 166).

On June 14, 1955, a wife respondent in a divorce suit applied for a civil aid certificate to defend divorce proceedings. On June 27, 1955, an interim order for alimony pending suit at the rate of £450 per annum less tax was made in her favour. That sum represented her sole income at the material time.

On August 18, 1955, the National Assistance Board assessed the wife's disposable income and capital, and fixed her maximum contribution at £107; in doing so the board took into account as part of her resources the amount of alimony pending suit ordered; and the Law Society offered her a civil aid certificate on that footing.

The wife applied by originating summons under R.S.C., Ord. 54A, r. 1A, for the determination of the question whether on the proper construction of section 4 (3) of the Legal Aid and Advice Act, 1949,[1] and regulation 2 of the Legal Aid (Assessment of Resources) Regulations, 1950,[2] the sum ordered to be paid to her for alimony pending suit was to be taken into account by the board in assessing her disposable income for the purpose of the civil aid certificate, and for a declaration that it was not so to be taken into account:—

Held, that the board had properly taken into account the sum of alimony pending suit in assessing the wife's disposable income for the purposes of the Act of 1949; claims for alimony pending suit—and equally claims for maintenance or for damages—were not and could never at any stage be "the subject matter of "the dispute" to be excluded from the board's computation of resources under section 4 (3) and regulation 2, for by their nature such claims had no ascertainable value, and the words "the subject "matter of the dispute" in the context of the Act and the regulation were apt to exclude only a specific thing or fund with an

---

[1] Legal Aid and Advice Act, 1949, s. 4 (3): "The regulations shall "include provision for securing that "the resources of a person seeking or "receiving legal aid shall be treated "as not including the subject matter "of the dispute."

[2] Legal Aid (Assessment of Resources) Regulations, 1950, reg. 2: "In computing the rate of income or "the amount of capital of the person "concerned there shall be excluded "the value of the subject matter of "the dispute in respect of which "application has been made for a "certificate."

C. A.
1956

Taylor (formerly Kraupl) v. National Assistance Board.

ascertainable value, which, being the subject matter in dispute between the parties, might be awarded to one of them as a result of the litigation.

Moss v. *Moss* [1956] P. 373; [1956] 1 All E.R. 291 applied.

Thorogood v. *Thorogood*, The Times, October 20, 1955 disapproved.

Per Denning and Hodson L.JJ. (1) Applications for increased alimony should not readily be entertained simply because a wife has to use some part of her alimony to pay contributions for legal aid.

(2) The danger that alimony might become liable to a double charge in favour of the legal aid fund, first, under section 4 (3) as a resource not being "the subject matter of the dispute" and, secondly, under section 3 (4) as "property . . . recovered" has been obviated by the amending regulation 16 (8) made in 1954 (S.I. 1954, No. 166) to the Legal Aid (General) Regulations, 1950, by which amendment alimony has been expressly excluded from chargeability.

Decision of Lord Merriman P. [1956] P. 470; [1956] 2 All E.R. 455 reversed.

Appeal from Lord Merriman P. on an originating summons under R.S.C., Ord. 54a, r. 1a.

The plaintiff was the respondent to a petition for divorce presented by her husband on March 11, 1955. The husband was a consultant psychiatrist earning a salary of £2,750 a year. He owned the matrimonial home. There were three children, two living at home and one at boarding school. About March 4, 1955, the husband left the home and went to live elsewhere, leaving the wife and children in the home. He made her a voluntary allowance of £4 a week and she received 8s. a week family allowance. Apart from that she had nothing except 19s. in the Post Office Savings Bank.

On March 11, 1955, the husband filed a petition for divorce. On June 14, 1955, the wife applied for legal aid, and made the necessary statement of her financial circumstances. In answer to the question: "Do you expect your income to remain about "the same during the next 12 months; if not, what difference do "you expect?"—she answered that she hoped her solicitors would obtain reasonable alimony. On June 27, 1955, she obtained an order for interim alimony pending suit at the rate of £450 per annum, less tax, so long as she remained at the matrimonial home. When tax was deducted the £450 a year would become less than £420 a year. The voluntary payments ceased.

On August 18, 1955, the National Assistance Board determined that the wife's disposable income was £370; that her disposable capital was nothing; and the board fixed her maximum contribution at £107. On August 20 the Law Society offered her a civil aid certificate on that footing.

On February 16, 1956, the wife issued an originating summons under R.S.C., Ord. 54A, r. 1A, against the National Assistance Board as defendants for the determination of the question whether, upon the proper construction of the Legal Aid and Advice Act, 1949, s. 4, and the regulations made thereunder, namely, the Legal Aid (Assessment of Resources) Regulations, 1950, as amended, the sum of £450 per annum less tax payable monthly to the wife pursuant to an interim order for alimony pending suit made on June 27, 1955, was to be taken into account in assessing her disposable income under the Act, and for a declaration that in her application for a civil aid certificate to enable her to defend and cross-petition in a suit for divorce any sum payable to her under an order for alimony pending suit in such suit was not to be taken into account in assessing her disposable income for the purposes of the Legal Aid and Advice Act, 1949.

The Law Society, as the body charged with the administration of the Legal Aid and Advice Act, 1949, was served with notice of the application and was separately represented at the hearing before Lord Merriman P., at which it was conceded by the National Assistance Board and the Law Society that the application for a civil aid certificate dated June 14, 1955, was for the purposes of the case to be deemed to be continuously effective up to the date of the hearing.

It was also conceded by counsel for the National Assistance Board that an application for alimony pending suit did raise a subject matter of dispute within the meaning of the regulation. That concession was made on the attention of counsel being called to the decision of the Divisional Court in *Thorogood* v. *Thorogood*,[3] in which Lord Merriman P. had expressed himself as of opinion that the amount of a current order for maintenance of a wife, made by a court of summary jurisdiction, was for the purposes of the Act of 1949 and regulation 2 "the subject matter "of the dispute"; and all counsel engaged in the present case assured the President that those observations were correct.

On May 14, 1956, Lord Merriman P., in a reserved judgment,[4] held, inter alia, that a declaration should be made that this wife was entitled not to have the amount of the alimony pending suit included in the computation of her disposable income for the purposes of her contribution to a civil aid certificate.

---

[3] The Times, October 20, 1955.

[4] [1956] P. 470; [1956] 2 All E.R. 455.

The National Assistance Board and the Law Society appealed.

Sir Harry Hylton-Foster Q.C., S.-G. and *Rodger Winn* for the National Assistance Board. The leave of the court is sought to withdraw the concession made by counsel for the board before Lord Merriman P. that an application for alimony pending suit did raise a " subject matter of the dispute " within the meaning of regulation 2 of the Resources Regulations, for it is now sought to submit that a claim for alimony pending suit can never be " the subject matter of the dispute " in this context. The concession was made in the following circumstances: the President called the attention of counsel to certain dicta obiter of his own in *Thorogood* v. *Thorogood*[5] indicating that the board ought in computing a wife's resources for legal aid purposes to have disregarded sums paid to her as maintenance, because the maintenance was " the subject matter of the dispute," and the President said that he ought not to hear the present case unless counsel agreed that those dicta correctly stated the law. Counsel agreed that they did and the concession was made in the present case, but it is submitted that those dicta were wrong. The matter is of some public importance and steps have been taken to ensure that this wife will not be prejudiced if the court grants leave to withdraw the concession and to argue the construction of the relevant words on a different footing in this court.

[The court granted leave to withdraw the concession.]

The words " the subject matter of the dispute " which occur only in section 4 (3) of the Act and regulation 2 of the Resources Regulations mean some specific property or asset which will be awarded to one of the parties as a result of the determination of the dispute, and which could, if necessary, be frozen by an interim injunction pending that determination. That construction accords with the probable intention of Parliament to retain the effect of the old poor persons' procedure rules (see Annual Practice, 1949, Addenda, p. xxi, R.S.C., Ord. 16, r. 23), which included in the list of matters to be disregarded " the subject matter of such " proceedings." The Law Society operated that rule to exclude the value of any " thing " which might be recovered in the proceedings; and until the decision in *Thorogood* v. *Thorogood*[5] the board continued to interpret the similar words in this Act and regulation in the same sense. But the President has now held

[5] The Times, October 20, 1955.

that the words mean "What the dispute is about" or "What is "at stake." If that is correct, they cover a claim for liquidated or for unliquidated damages, or—as in this case—for alimony pending suit under an order made by the court in its unfettered discretion, and that would have results which Parliament could not have intended, for it would follow that the wife of a rich man, receiving substantial alimony, would be able to get legal aid without contribution, while a working woman in modest circumstances or in receipt of a voluntary allowance or payment under a deed might have to make a substantial contribution to legal aid. The intention of this Act, as stated in the preamble, is to assist persons of "small or moderate means" to obtain legal aid.

It is significant that rule 3 of Part I of the First Schedule to the Resources Regulations sets out in detail matters to be disregarded by the board in computing income, but alimony is not included in that list. If it was intended that it should be disregarded altogether, it would be odd to have left it to be covered by the phrase "the subject matter of the dispute," which is susceptible of a wider and a narrower meaning.

It is clear that that which falls within the term "subject "matter" in section 4 (3) is something which, apart from the section, would be a "resource" of the applicant; but it is difficult to think of the "subject matter" or the "issue" in an action other than some form of property which could constitute a "resource," for the issue in an action often has no value as a resource. Thus the meaning of this phrase must be narrower than "the issue in the action" and must fit its statutory context. Regulation 2 confirms the construction here advanced on behalf of the board, for it makes plain that the "subject matter" in question must have a *value*. A claim for alimony pending suit never has the character of a specific piece of property which can be earmarked as "the subject matter of the dispute" any more than does a claim for damages. It is of the essence of alimony that it is meant to be, and is, spent on day-to-day needs; it cannot be preserved during the litigation and handed to the successful party after the dispute has terminated. It is interesting to contrast the present decision under appeal with the decisions of this court in *Rimmer* v. *Rimmer*[6] and *Tunstall* v. *Tunstall*,[7] in which, on applications under section 17 of the Married Women's Property Act, 1882, relating to "property in dispute," the court held that where there was a specific fund, an order could be made under

---

[6] [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863.

[7] [1953] 1 W.L.R. 770; [1953] 2 All E.R. 310.

C. A.
1956

TAYLOR (FORMERLY KRAUPL) v. NATIONAL ASSISTANCE BOARD.

section 17, but that where there was no specific fund, the court could not give judgment in a sum of money.

In the present case the President said[8] that the board had a sufficiently wide discretion to make a notional assessment of what the alimony ought to be and that such alimony could constitute " the subject matter of the dispute " and as such be excluded from the " resources " taken into account by the board; but the importance of construing the phrase goes far beyond this case and alimony; and the task of the board would be rendered impossible if, for instance, on a claim for damages the board had to try notionally to estimate the probable award of a court and subtract that estimated amount from a defendant's resources.

[HODSON L.J. Alimony is not intended to pay the wife's costs in divorce proceedings. The established practice is that husbands have to give security for their wives' costs, and if costs are now to be paid out of alimony, it strikes a blow at that established practice.]

That may be so, but this is a form of public assistance, and the board has to administer the scheme in accordance with the Act and the regulations.

Secondly, if a claim for payment of alimony pending suit is ever capable of being " the subject matter of the dispute " within the terms of regulation 2, it is submitted that it has ceased to be so after the order for alimony has been made. The board has to make its computation on the facts known to it at the time when it makes the computation, and not, as the plaintiff contended, at the date of the application for legal aid; and if one of the known facts at that time is that an order for alimony has been made in the course of the dispute, the effect of that order on the resources of the applicant must be taken into account. Lord Merriman P.[9] has held that the period from which the computation is to begin remains fixed from the start. That cannot be correct, for regulation 8 (5) of the Legal Aid (General) Regulations, 1950, and the decision in *Moss* v. *Moss*[10] make it clear that a new period of computation begins from the date of the change in circumstances —in this case the date of the order, June 27, 1955. What the board has to consider is whether there is a dispute in regard to the " subject matter " at the relevant date, for regulation 2 speaks in the present tense and should be so interpreted; the opening words " In computing " are equivalent to " whensoever " and apply equally where the computation is made (*a*) initially and immediately on receipt of the application for a civil aid certificate; or (*b*) after some delay due to administrative commitments or deliberate postponement; or (*c*) on a redetermination after some change of circumstance.

---

[8] [1956] P. 470, 500.

[9] Ibid. 502.

[10] [1956] P. 373; [1956] 1 All E.R. 291.

Though it is conceded that alimony is devised to support a wife and has always been regarded as inalienable, what is sought here is not to alienate the alimony but to make a married woman pay contributions out of a fund already due and payable to her, and to secure that a litigant with large alimony shall not be given legal aid at the taxpayers' expense when her husband could easily be compelled to pay her costs.

The President has also said[11] that it could not be right to include "the subject matter of the dispute" as a "resource" under section 4 (3) because it would mean that some single resource of an applicant might then become subject to a double charge for legal aid, first, under section 4 (3) as disposable income, and, secondly, as "property . . . recovered" under section 3 (4). But in practice the legal aid scheme is not operated to produce that result, and there is no reason why a litigant enriched by his judgment should not pay contributions under section 3 (4) for the legal aid which he has already received.

John Latey and *B. H. Anns* for the Law Society. An application for alimony pending suit can never be "the subject matter "of the dispute" because at the time of the application it is in posse and does not exist in any ascertainable or monetary form, while at the time of the order it has ceased to be in dispute.

The submission of the Solicitor-General on the proper meaning of "the subject matter of the dispute" in this context is adopted for the Law Society and accords with the construction given to "the subject matter of such proceedings" in the old rules for proceedings in forma pauperis as operated by the Law Society. On any ordinary use of language it is unreal to regard alimony pending suit as the subject matter of any dispute between the parties. It is an allowance for which the wife has by statute a right to apply and which the court has by statute a right to grant; it is not affected by the issues pleaded in the suit and it comes to an end automatically whether the wife succeeds or loses.

It was submitted on behalf of this wife before the President that, if alimony pending suit was not to be excluded from the board's computation, the paradoxical result might follow of a spiral of alimony applications chasing legal aid contributions and legal aid contributions chasing alimony. That is an unreal objection, for registrars, who are experienced in these matters, would know the right amount to allow for contributions to legal aid and could state that that had been taken into account in fixing the alimony, and as the board has a wide discretion in regard to contributions, there should be no great practical difficulty in arriving at a fair solution.

---

[11] [1956] P. 470, 503.

J. E. S. Simon Q.C. and *Roger Ormrod* for the wife plaintiff. Prima facie, the ordinary meaning of "the subject matter of the "dispute" would be apt to include alimony pending suit. There is nothing in this context to displace that ordinary meaning and many indications that Parliament intended the words to have their ordinary meaning such as to exclude alimony.

First, in construing the words, regard should be had to their relationship with the words "property . . . recovered or preserved ". . . in the proceedings" in section 3 (4). That section makes such "property" chargeable with sums remaining unpaid on account of a person's contribution to legal aid. The logical position is this: "property . . . recovered or preserved" is not coincident with "the subject matter of the dispute," but obviously the latter must include the former. That alimony (and maintenance) were regarded as being included in "property . . . recovered "or preserved" is apparent from the fact that in 1954, by an amendment to the Legal Aid (General) Regulations, 1950 (S.I. 1954, No. 166), Parliament took alimony and maintenance "payable under sections 19, 20, 22, 23, 26 and 28 of the Matrimonial "Causes Act, 1950," out of the chargeability provisions of section 3 (4) by enacting that "the expression 'property' shall not be "taken as including any moneys so payable." Thus, if alimony pending suit was included in "property . . . recovered" and "property . . . recovered" is included in that which is "the "subject matter of the dispute," it follows that alimony pending suit must be included in "the subject matter of the dispute."

The amendment of 1954 is relied on as showing also that Parliament, by making it, was upholding the well-established principle that alimony is for the personal support of the wife and is not chargeable for her legal costs.

A further guide to the construction of these words is the settled view of the courts—and of the legislature in this Act and by this amendment—that alimony is inalienable and unassignable. Though it is conceded that the court cannot control the way in which a wife may spend her alimony, and that, if she uses it to pay contributions to legal aid, that may not amount to alienation any more than would similar use of retired pay (which is similarly inalienable) by an officer, the court should lean against construing a statute to make alimony chargeable for legal costs: see *per* Vaughan Williams L.J. in *Paquine* v. *Snary* [12] that it could not have been the intention of the legislature that a wife should be placed in such a position that the money intended by the statute for her support should be taken by her judgment creditors; and *per* Younger L.J. in *J. Walls Ltd.* v. *Legge*.[13] In *Allen* v. *Allen* [14] Lindley L.J. said that an order for costs should not be disturbed because that would indirectly disturb the order as to alimony; and in *Williams* v. *Williams* [15] it was said that "if you "give alimony pendente lite with one hand, you must not take "it away with the other." That is what will happen in the present case if the board's contention is accepted, for though the wife is not bound to accept a legal aid certificate, she is faced with the choice of either refusing legal aid or of paying contributions on a scale which will make it impossible for her to support her family.

[Hodson L.J. Why did she not apply for security for costs from her husband? Why should the public pay?]

She had either to apply for security for costs or for alimony, and nowadays solicitors are not prepared to take a chance on getting an order for security for costs where it is possible to obtain legal aid; accordingly, the application made was for alimony.

Thirdly, the court will lean against a construction which produces unfair or absurd results, and if "the subject matter of "the dispute" is held not to cover alimony pending suit, such results will follow. For instance, a wife who has no resources may apply for legal aid and obtain a certificate with a "nil" contribution; she may then apply for alimony and get, say, £550 a year. On the board's submission there is then a reassessment by the board, which gives her a disposable income of, say, £356 a year, and the Law Society will stipulate for a contribution of £100 if she takes up the certificate. That is a charge on her income which was not considered by the registrar, and she will therefore be entitled to apply to have her alimony increased. That will lead to a spiral, and eventually she may obtain alimony on such a scale as to take her out of the legal aid scheme altogether. That would mean that her income was no longer charged with contributions for legal aid, and her husband in turn

---

[12] [1909] 1 K.B. 688, 691; 25 T.L.R. 212.

[13] [1923] 2 K.B. 240, 246–247.

[14] [1894] P. 134, 138.

[15] [1929] P. 114, 117; 45 T.L.R. 157.

C. A.
1956

Taylor (formerly Kraupl) v. National Assistance Board.

could apply for a reduction in alimony, and so she might again come into the legal aid limits. Thus it would become a matter of chance whether when the trial took place she was in or out of the scheme. Parliament could not have intended such a result.

In answer to the submission that once the order for alimony pending suit has been made the " dispute " is over it is submitted that " alimony " was and remains " the subject matter of the " dispute in respect of which application has been made for a " certificate " within the meaning of regulation 2. On that reading it does not matter *when* the board's computation is made, for on the ordinary meaning of the phrase the " subject matter "—alimony—is taken out of the board's computation by section 4 (3) and regulation 2, and, by the amending regulation 16 (8) of the General Regulations, it is taken out of the chargeability provisions of section 3 (4).

The danger pointed out by the President that some single resource might become doubly liable to contribution, first, under section 4 (3) as disposable income, and, secondly, under section 3 (4) as " property . . . recovered," is in general justified, though since the amending regulation of 1954 it no longer applies to alimony and maintenance.

When it is said that this wife should have applied for security for costs from her husband, it must be remembered that in modern times husbands with very large salaries often have no capital assets. Orders for security for costs were previously made on capital, and now that they cannot always be made on capital, because husbands have no capital to be charged, there has been a radical change in the practice relating to such orders. Registrars tend to make only partial orders for costs based on their own estimate of the length of the trial, and even where a wife gets a full order for party and party costs, it rarely proves to be enough to meet the costs because the cases go on for such a long time.

Sir Harry Hylton-Foster Q.C., S.-G. and *John Latey* replied.

Cur. adv. vult.

December 19. The following judgments were read.

Denning L.J. In this case a husband has brought a suit for divorce against his wife. She seeks legal aid to enable her to defend the case. She is entitled to legal aid from the State according to her means. If her disposable income is less than £156 a year, she is entitled to legal aid free of any contribution by herself. If her disposable income is more than £156, but less than £420 a year, she is entitled to legal aid, but she has to make a contribution herself towards the costs. If her disposable income is more than £420 a year, she is not entitled to legal aid at all. The computation of her disposable income is entrusted to the National Assistance Board.

[His Lordship stated the facts set out above and continued:] It is quite plain that, in determining the wife's disposable income, the National Assistance Board have included the alimony as part of her resources, for without it she would have nothing. She contended that this was not legitimate. She says that her alimony should be excluded from the computation. She has brought the present proceedings to test the position. She has taken out an originating summons against the National Assistance Board asking for a declaration that her alimony should not be taken into account and that their determination was ultra vires. The National Assistance Board in making their computations act as an administrative body under section 4 of the Legal Aid and Advice Act, 1949, and the Legal Aid (Assessment of Resources) Regulations, 1950. At the outset I must observe that under regulation 9 (2) of those regulations "every decision or determination of the Board "shall be final"; and in the court below it was submitted by Mr. Winn, on behalf of the National Assistance Board, that their determination could not be challenged in these proceedings. Lord Merriman P. overruled this objection, and the Solicitor-General did not pursue it before us. I would like to say in passing that I entirely agree with the President on this point. The remedy by declaration is available at the present day so as to ensure that a board or other authority set up by Parliament makes its determinations in accordance with the law; and this is so, no matter whether the determinations are judicial or disciplinary, or, as here, administrative determinations: see *Reg.* v. *Staff Sub-Committee of London County Council's Education Committee; Ex parte Schonfeld,*[1] and the recent decision of the House of Lords in *Vine* v. *National Dock Labour Board.*[2] The remedy is not excluded by the fact that the determination of the board is by statute made "final." Parliament only gives the impress of finality to the decisions of the board on the condition that they are reached in accordance with the law, and the Queen's courts can issue a declaration to see that this condition is fulfilled.

---

[1] Judgments of the Court of Appeal, 1956, No. 60.

[2] [1957] 2 W.L.R. 106; [1956] 3 All E.R. 939.

The point before us is whether, in computing the disposable income of the wife, the board are in law entitled to include the alimony of £450 a year, less tax, as part of her resources, or whether they are bound to exclude it. It is plain that if this married woman were involved in litigation with her dressmaker or any person other than her husband, the alimony would be part of her resources and would have to be included in computing her rate of income; but it is said by the wife that it is to be excluded in this divorce suit because it is "the subject matter of the "dispute." This contention is based on section 4 (3) of the Act of 1949, which says that "the resources of a person seeking or "receiving legal aid shall be treated as not including the subject "matter of the dispute"; and regulation 2 of the Assessment Regulations, which says that "in computing the rate of income "or the amount of capital of the person concerned there shall "be excluded the value of the subject matter of the dispute in "respect of which application has been made for a certificate."

When this case was before the President, Mr. Winn, on behalf of the National Assistance Board, conceded that alimony pending suit does raise a subject matter of dispute; but before us the Solicitor-General sought leave to withdraw that concession, and we allowed him to do so. He contended that an application for alimony pending suit was not a "subject matter of the dispute" any more than a claim for damages would be. He said that the words "the subject matter of the dispute" referred only to cases where a specific piece of property was in dispute.

If the words "the subject matter of the dispute" were to be read in isolation out of their context, they would, I think, cover the alimony pending suit. But when the words are read in their context it seems to me plain that they only refer to a "subject "matter of the dispute" which falls within the "resources" of the person and has a "value" which can be assessed. The task of the board is to ascertain the "resources" of the applicant, dividing those resources into "income" and "capital"; and, having done so, then if the board find that any item in that computation is "the subject matter of the dispute," the board must exclude it. It is only when an item comes prima facie within the "resources" of the applicant that any question arises about "the subject matter of the dispute." The position is best seen by some examples. Take a claim for damages for personal injuries quantified as £500 special damages and, in addition, general damages. The claim is no part of the resources of either side. It is not available to or at the disposal of either of them. It does not come within the computation of capital or income at all. It is not to be added to the plaintiff's capital on the assumption that he will win the case, nor deducted from the defendant's capital on the footing that he will lose it. It is excluded, not because it is "the subject matter of the dispute," but because it does not come into the resources of either. Now take a case where £500 is standing in a bank in the name of the defendant, and the plaintiff claims that it is held by the defendant in trust for him, which the defendant denies. The £500 is certainly part of the "resources" of one or other of them, but no one can tell to which it belongs until the action is decided. It is excluded from the computation of "resources" on both sides, because it is "the subject matter of the dispute." These examples convince me that the words "the subject matter of the dispute" in the Act and regulations refer only to a specific thing or a specific fund which would properly form part of the resources of the applicant except for the fact that it is the very subject matter of the proceedings and is for that reason to be excluded.

Applying this meaning, I am satisfied that when the wife applied on June 14, 1955, for a certificate for legal aid, the claim for alimony pending suit was no part of her resources, and was not at that date to be included in the computation. But when the wife on June 27, 1955, obtained an order for alimony of £450 a year, less tax, it was part of her resources, and it called for the consideration of an entirely new period of computation beginning from that date: see *Moss* v. *Moss*,[3] *per* Willmer J. It was part of her income from that time and was properly included by the board in their computation. It did not fall to be excluded as being "the subject matter of the dispute" any more than a claim for damages would be excluded. It was not a specific thing or a specific fund, but merely a claim which had been successfully pursued to judgment.

It is interesting to notice that the voluntary allowance made by the husband was part of the resources of the wife and would clearly have had to be included as her income: see the Legal Aid (Assessment of Resources) Regulations, 1950, Sch. I, Part I, rule 7. So, also, would an allowance payable under a separation deed. It would be strange if an allowance, payable voluntarily or by deed, were to be included and the compulsory alimony excluded. Each has intrinsically the same quality, namely, to provide for the wife.

---

[3] [1956] P. 373, 384; [1956] 1 All E.R. 291.

Mr. Simon urged that if the alimony were included and the wife had to pay contributions out of it, it would mean that she could then go back to the court and ask for her alimony to be increased, and that after the increase in alimony the board would then increase her contribution; and so on until her alimony exceeded the limits for legal aid. This prospect is more theoretical than practical. I do not think that alimony should be increased simply because a wife has to use some of it to pay contributions for legal aid. Mr. Simon also argued that the alimony must be "the subject matter of the dispute" because it would be "property . . . recovered" and would be the subject of a charge in favour of the legal aid fund under section 3 (4); and it cannot be supposed that it should also be made a ground for making her pay contributions to the legal aid fund. The answer is, however, that alimony has never in practice been treated as the subject of a charge, and it is now expressly exempted by the regulations. There is, therefore, no duplication as feared by Mr. Simon.

I ought to mention the case of *Thorogood* v. *Thorogood*,[4] where a wife obtained from the magistrates a maintenance order for £5 a week, and the husband appealed to the Divisional Court asking for it to be reduced. The wife applied for legal aid, and the National Assistance Board took the £5 into account as part of her income. The President said that that was "utterly wrong," because the amount of the order was the actual subject of the litigation. When the present case was before the President all counsel assured him that those observations were perfectly correct in connexion with that particular case. I am afraid that, having heard argument, I do not agree. The £5 a week was part of the resources of the wife, and there was no reason to exclude it. There was no specific thing or specific fund involved in the proceedings. There was simply a claim that had materialized.

In the result, I come to a different conclusion from the President, but this is largely because the National Assistance Board made concessions before him that were erroneous. I would allow the appeal and refuse the declaration sought by the wife.

HODSON L.J. The question for determination on this appeal is whether the sum of £450 per annum, less tax, payable to the plaintiff pursuant to an interim order for alimony pending suit, is to be taken into account by the National Assistance Board in assessing the disposable income of the plaintiff for the purposes of the Legal Aid and Advice Act, 1949.

---

[4] The Times, October 20, 1955.

The plaintiff has applied for a civil aid certificate to enable her, inter alia, to present and defend proceedings for divorce and to obtain alimony. The question turns upon the construction of section 4 (3) of the Act, which reads as follows: "The regulations shall include provision for securing that the resources of "a person seeking or receiving legal aid shall be treated as not "including the subject matter of the dispute"; and on regulation 2 of the Legal Aid (Assessment of Resources) Regulations, 1950, made in accordance with the direction contained in section 4 of the Act. Regulation 2 reads as follows: "In computing the "rate of income or the amount of capital of the person concerned "there shall be excluded the value of the subject matter of the "dispute in respect of which application has been made for a "certificate."

The contention of the plaintiff is that, on the true construction of the regulation, alimony pending suit is not to be taken into account in assessing disposable income because it is to be excluded from consideration as being the subject matter of the dispute in respect of which application is being made for a certificate.

The National Assistance Board said that alimony pendente lite is not the subject matter of the dispute within the meaning of the regulation and, alternatively, if it was the subject matter of the dispute in respect of which the application was made, then there was no dispute at the time when the rate of income of the plaintiff was computed, since once the amount of alimony was determined by order, as had happened here, there was then no subject matter of dispute in this respect.

The Law Society further contended that even before the determination of the amount of alimony there was no subject matter of dispute, because it was a mere claim which might or might not succeed and did not exist in monetary form so as to be capable of valuation.

It is to be noted that alimony paid to a wife does not form part of the husband's resources, since in matrimonial suits husband and wife are not assessed as one, and alimony paid by a husband is a valid deduction for the purposes of any assessment for legal aid made upon him: see Legal Aid (Assessment of Resources) Regulations, 1950, reg. 4 (2) and Sch. I, Part II, clause 5 (ii).

The contention of the plaintiff is a startling one, for it involves that, however large an income a wife may be receiving, provided

C. A.
1956

Taylor (formerly Kraupl) *v.* National Assistance Board.

Hodson L.J.

she receives it solely in the form of alimony pendente lite, she will not be asked to make any contribution towards the cost of litigation with her husband; whereas, if she were in receipt of payments in another form, as, for example, by way of an allowance from her husband or some other person, or by way of income under a settlement or deed, or derived from investments, she would be bound to contribute in accordance with her means.

One's surprise is enhanced by the language of the preamble to the Act, which shows that it is an Act to make legal aid in England and Wales more readily available for persons of small or moderate means, to enable the cost of legal aid for such persons to be defrayed wholly or partly out of moneys provided by Parliament, and for purposes connected therewith. Nevertheless, if the words to be construed are plain, the plaintiff, although not a person for whom this form of public assistance was apparently designed, is entitled to succeed.

The argument before the President proceeded on the basis advanced by the plaintiff and conceded by Mr. Winn, on behalf of the National Assistance Board, that an application for alimony pending suit does raise a subject matter of dispute within the meaning of the regulation. This concession was made on the attention of counsel being called to the unreported case of *Thorogood* v. *Thorogood*,[5] a decision of the Divisional Court, in which Lord Merriman P. had expressed himself as of opinion that the amount of a current order for maintenance of a wife made by a court of summary jurisdiction is for the purposes of the Act and regulation "the subject matter of the dispute."

Such payments are clearly in pari materia with the payments for alimony pendente lite under consideration, and it appears to me that the order for maintenance made in *Thorogood* v. *Thorogood*[5] raises the same considerations as those which are raised by the order for alimony pendente lite in the present case.

Once this concession is made I respectfully agree with the conclusion and the reasons for the conclusion reached by the President, that the subject matter of the dispute was one in respect of which application had been made for a certificate, and that it does not cease to fulfil those words of description because at some stage the dispute has been determined. The argument runs that the subject matter of the dispute is ascertained at the date of the application for the certificate, and remains constant throughout, notwithstanding that its value has been ascertained before the computation is made. I agree. I agree also that on this footing an undetermined application for alimony pendente lite would be a subject of dispute.

---

[5] The Times, October 20, 1955.

In this court, however, the Solicitor-General has, by leave, presented the case on an entirely different basis, and argument has been directed to overthrow the agreed basis that an application for alimony pendente lite does raise a subject matter of dispute within the meaning of the regulation.

No doubt the ordinary use of the words "subject matter" would be apt to include alimony; but in their context these words are not, in my opinion, susceptible of so wide a meaning. It is not the subject matter of the dispute but its "value" which has to be taken into account, and this value is to be considered in assessing the resources of the applicant for legal aid in pursuance of section 4 of the Act. The words, therefore, cannot have such a wide meaning as would include all issues between the parties.

The disputed issue in a suit often has no monetary value at all. Instances can be multiplied, one obvious example being the issue raised in suits for divorce. The use of the word "value" points to a thing or piece of property which can be identified, and, if necessary, maintained by injunction in its undisturbed state pending the litigation between the parties. This could apply to a sum of money in the hands of a third party about which a dispute arose, but not, if my construction of the regulation is correct, to a money claim for damages, liquidated or unliquidated; nor to claims for alimony or maintenance in proceedings between husband and wife.

The words "subject matter of proceedings" appeared in the rules formerly regulating poor persons' procedure. In Ord. 16, r. 23, there appeared: "(1) that the poor person is not worth a "sum exceeding £50 (excluding wearing apparel, tools of trade "and the subject matter of such proceedings . . ." In this context the words "subject matter" would seem to have the meaning of a specific thing, since otherwise one would not expect to find them included in the list of capital items to be disregarded.

Mr. Simon, on behalf of the plaintiff, did not contend that by reason of its inalienable quality alimony pendente lite could not be treated as part of the available resources of a person seeking legal aid, since he recognized that other inalienable resources, such as officers' retired pay, could be so treated, and there is no question of creating a charge on or otherwise alienating the alimony of the plaintiff. He did, however, urge as an aid to construction that this quality of alimony would make it at least unlikely that the legislature would intend alimony, which is intended for the support of the wife, to be used for such purposes as legal aid. He argued that there would be practical difficulties if the registrar in performing his duty of allotting alimony had to take account of the fact that the recipient would be treated as having resources available for her legal aid, and the court might be faced with applications for further alimony to meet the burden imposed.

I do not think applications of that kind for further alimony ought readily to be entertained. A wife who has no other resources but alimony may be called upon to bear certain costs which are not recoverable on taxation, quite apart from legal aid considerations, and it is never possible to control the way in which alimony, though intended for the support of the wife, is in fact spent by her.

Mr. Simon further argued that alimony fell into the class of property recovered for an assisted person dealt with by regulation 16 of the Legal Aid (General) Regulations, 1950, as subsequently amended, and, accordingly, is prima facie subject to a charge for costs and ought not to be treated as resources in the applicant's hands for the purpose of assessing her contribution. It is true that by regulation 16 (8) (which came into force in 1954) this charge does not attach to alimony so recovered, but this is irrelevant to the argument, for the necessity for the exception confirms that alimony is "property . . . recovered" within the meaning of the regulation as it originally stood. It is said that if alimony is "property . . . recovered," it ought not to be also regarded as "resources" available to the person receiving aid.

These considerations do not shake my opinion that, upon the true construction of the regulation, alimony pendente lite never at any time comes within the words of exclusion contained in section 4 (3) of the Act or regulation 2. When the plaintiff obtained an order for alimony pendente lite on June 27, 1955, the money payable under that order became part of her resources available for contribution and called for a new period of computation as from that date: see *per* Willmer J. in *Moss* v. *Moss*.[6] This construction is, I think, consonant with the object of the statute as expressed in the preamble and with the general scheme of the statute as expressed in the Act itself, and in the regulations made thereunder.

---

[6] [1956] P. 373, 384.

Accordingly, in my view the National Assistance Board and the Law Society are right in their contentions that alimony pendente lite is to be taken into account as a resource in assessing the disposable income of the plaintiff for the purposes of a civil aid certificate. I would allow the appeal accordingly.

ORMEROD J. This case was argued before the President on the footing that alimony pending suit constitutes a subject matter in dispute. This was conceded by counsel on behalf of the National Assistance Board, and if he was right in this, then I would respectfully agree with the President's conclusions. The Solicitor-General, however, was given leave to withdraw this concession, and the appeal turned on the question whether, on a true construction of section 4 (3) of the Legal Aid and Advice Act, 1949, and regulation 2 of the Legal Aid (Assessment of Resources) Regulations, 1950, alimony pending suit should be excluded from the computation of the wife's resources as being the "subject "matter of the dispute."

Taken by themselves the words "subject matter of the "dispute" would seem to have a meaning wide enough to include any matter the subject of the particular litigation in question. It is plain, however, on reading regulation 2 that, in the context we are considering, the meaning of the words must be a restricted one. Section 4 (3) is dealing with the "resources" of a person seeking legal aid, and there are many things which might be the subject matter of a dispute which cannot for obvious reasons be considered as resources. Regulation 2 deals with the "value" of the subject matter of the dispute, and it must also be clear that there are many matters the subject of litigation to which no monetary value can be attached. Without attempting an exhaustive definition of what may or may not be the subject matter of a dispute in this context matters such as a specific chattel or a specific fund in the control of one or other of the parties would seem to be within the regulation, and should therefore be excluded in a computation of resources. Equally, a liquidated or unliquidated claim for damages, although no doubt in the general meaning of the words "the subject matter of "the dispute," would not come within the regulation, as such damages could not be regarded as resources in the possession or control of the applicant. My view is that a claim for alimony pending suit must be considered on the same footing as a claim for damages. At the time when the wife made her application

C. A.
1956

Taylor (formerly Kraupl) v. National Assistance Board.

Ormerod J.

the claim for alimony was one which she hoped would be successful but was in no sense a resource, nor was it something which at that time could be valued. On the true construction of the section and regulation, therefore, it would seem that it was not intended that a claim for alimony in these circumstances should be regarded as the subject matter of the dispute and thereby excluded from the computation if at some future date the order for alimony was made. For these reasons I would allow the appeal.

Appeal allowed.
Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor, National Assistance Board; T. G. Lund, the Law Society; Kenneth Brown, Baker, Baker.*

M. M. H.

1956
Nov. 15.

Karminski J.

C. A.

1956
Dec. 17.

Denning, Hodson and Morris L.JJ.

SUGDEN *v.* SUGDEN.

Husband and Wife — Maintenance — High Court — Divorce — Consent order that respondent "pay or cause to be paid" maintenance for children until 21*—Death of respondent before children attain* 21*—Maintenance not payable from husband's estate—Whether jurisdiction in divorce court to order periodical payments for maintenance from respondent's estate—No cause of action subsisting against respondent's estate—Law Reform (Miscellaneous Provisions) Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 (1)*—Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1), (3).
Death.

An order for the maintenance of the two children of a marriage was made by consent in April, 1946, after the marriage had been dissolved. By that order the respondent husband was ordered to "pay or cause to be paid" to the wife petitioner until further order maintenance for each child, payable monthly, until each respectively attained the age of 21. The respondent died in 1955. The petitioner applied for an order that the respondent's executrix should pay the arrears accrued since his death and comply with the order of April, 1946.

Karminski J. held that this was a case in which there was in existence during the lifetime of the father an enforceable claim against him which survived against his estate under section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934.[1] On appeal by the executrix:—

Held, that the order connoted an obligation by a living man to make periodical payments during the joint lives of himself and the children, and came to an end at his death.

Hinde v. *Hinde* [1953] 1 W.L.R. 175; [1953] 1 All E.R. 171 applied.

Dipple v. *Dipple* [1942] P. 65; 58 T.L.R. 141; [1942] 1 All E.R. 234 explained.

Per curiam. It is doubtful whether the Divorce Court has any jurisdiction to order a man to make periodical payments of maintenance extending beyond his death such as to bind his personal representatives.

Per Denning L.J. The proper way to provide maintenance for children after the father's death is by an order on the father during his lifetime to make secured provision for them under section 26 (3) of the Matrimonial Causes Act, 1950.[2] Under the present order there was no cause of action subsisting against the father's estate which constituted a right or liability under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1).

Order of Karminski J. reversed.

SUMMONS (adjourned into court).

An order was made on July 3, 1945, consequent upon the divorce of the parties, whereby the husband was ordered to pay £270 a year less tax to the wife (the petitioner in the suit) and £300 a year less tax for each of the two children of the marriage, a son born in December, 1936, and a daughter born in April, 1940. That order was varied on April 25, 1946, after the wife had remarried. The terms of the order, which was by consent, were as follows: "Upon hearing the solicitors for the parties and "by consent it is ordered that [the husband] do pay or cause "to be paid to [the wife] during their joint lives until further "order, as from May 13, 1946, maintenance for herself at and "after the rate of 1s. per annum, the said sum to be payable "monthly, and that [the husband] do pay or cause to be paid "to [the wife] until further order until [the son] and [the "daughter] the children issue of the marriage between the "parties shall respectively attain the age of 21 years as from "the said May 13, 1946, maintenance for the said children at "and after the rate of £300 per annum less tax for each child, "the said sums to be payable monthly. . . ."

---

[1] Law Reform (Miscellaneous Provisions) Act, 1934, s. 1: " (1) Subject " to the provisions of this section, on " the death of any person after the " commencement of this Act all causes " of action subsisting against or vested " in him shall survive against, or, as " the case may be, for the benefit of, " his estate. Provided that this sub- " section shall not apply to causes of " action for defamation or seduction or " for inducing one spouse to leave or " remain apart from the other or to " claims under section 189 of the " Supreme Court of Judicature (Con- " solidation) Act, 1925, for damages " on the ground of adultery."

[2] Matrimonial Causes Act, 1950, s. 26: " (1) In any proceedings for " divorce or nullity of marriage or " judicial separation, the court may " . . . make such provision as appears " just with respect to the custody, " maintenance and education of the " children the marriage of whose " parents is the subject of the pro- " ceedings. . . . (3) On any decree " of divorce or nullity of marriage, the " court shall have power to order the " husband, and on a decree of divorce " made on the ground of the husband's " insanity, shall also have power to " order the wife, to secure for the " benefit of the children such gross " sum of money or annual sum of " money as the court may deem reason- " able, . . . : Provided that the term " for which any sum of money is " secured for the benefit of a child " shall not extend beyond the date " when the child will attain twenty- " one years of age."

The father of the children, who was a solicitor in practice in the North of England and a man of substantial capital assets, also remarried; but he continued to pay regularly under the order of April 25, 1946, until his death on June 22, 1955. Before his death, he revoked a will made in 1952 by which he had left £6,000 to his children, and made a new will by which he left the whole of his estate, valued at over £37,000, to his second wife, whom he appointed sole executrix. After his death the executrix paid sums of £56 in October, 1955, and also in January, April and June, 1956.

The petitioner (the mother of the children) applied to the court on summons for an order that the executrix should pay out of the deceased's estate the arrears which had accrued since the respondent's death and should comply with the order of April 25, 1946, by paying the sums payable under that order, as and when they became due, out of the estate. Mr. Registrar Kinsley refused to make the order, and the petitioner appealed.

An application was also made in the Chancery Division on behalf of the children that provision should be made for them under the Inheritance (Family Provision) Act, 1938; but a decision on that application was stood over pending the determination of the present summons.

Geoffrey Crispin for the petitioner. The position in divorce matters before 1934 which arose upon the death of one of the parties is expressed in *Stanhope* v. *Stanhope*,[3] in which it was made clear[4] that although revivor was commonly practised in Chancery, and there was also a writ of revivor at common law, there was no rule of revivor in divorce, and the legal personal representative could not revive a suit for the purpose of applying

[3] (1886) 11 P.D. 103; 2 T.L.R. 447.

[4] 11 P.D. 103, 106.

to make a decree nisi absolute after a party had died. That position was altered by section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934,[5] in which, although claims for damages on the ground of adultery were expressly excepted, no exception was made in respect of maintenance claims under sections 190 and 193 of the Supreme Court of Judicature (Consolidation) Act, 1925 (now sections 19 and 26 of the Matrimonial Causes Act, 1950).

The meaning of "cause of action" in the section,[5] when applied to applications relating to ancillary relief, was considered by Hodson J. in *Dipple* v. *Dipple*,[6] in which it was held that the right of a wife to apply for a secured provision was not a "cause "of action" against her former husband which survived against his estate. But in that case the wife had obtained no order before her former husband's death: in the present case the court had already exercised its discretionary powers, and an order had for some years been in existence, before the husband died. The position, therefore, was similar to that in *Richards* v. *Richards and Flockton*,[7] where an order for costs made before the co-respondent's death was held enforceable against his estate.

There is a distinction between sections 19 (3) and 26 (1) of the Matrimonial Causes Act, 1950[8]: in the former there is a restriction of orders for payment to joint lives; but in the latter the court has an unrestricted power to make "such provision as "appears just." It is submitted that, although there is power under section 26 (3) to order a secured provision for children until they reach 21, those powers are additional to the general powers under section 26 (1), and that no joint lives limitation is to be inferred in orders made under the first subsection. This order, moreover, is expressly stated to be until further order and until the children attain the age of 21.

Once the court has made an order it remains enforceable against the estate. [*Hyde* v. *Hyde*[9] was referred to and the argument therein on behalf of the petitioner, and also *Mosey*

---

[5] See note 1, p. 121.

[6] [1942] P. 65; 58 T.L.R. 141; [1942] 1 All E.R. 234.

[7] [1942] P. 68n.; 58 T.L.R. 142n.

[8] Matrimonial Causes Act, 1950, s. 19 (3): "On any decree for divorce "or nullity of marriage, the court "may, if it thinks fit, by order direct "the husband to pay to the wife, "during their joint lives, such monthly "or weekly sum for the maintenance "and support of the wife as the court "may think reasonable . . ."

S. 26 (1): "In any proceedings "for divorce or nullity of marriage or "judicial separation, the court may "from time to time, either before or "by or after the final decree, make "such provision as appears just with "respect to the custody, maintenance "and education of the children. . . ."

[9] [1948] P. 198; 64 T.L.R. 105; [1948] 1 All E.R. 362.

1956

SUGDEN v. SUGDEN.

v. *Mosey and Barker*.[10]] The reasonable interpretation of the present order is that it should in fact remain in force until, as expressed in the order itself, the children reach 21, and that that order is not terminated by the husband's death any more than it would be terminated by the wife's death (even though the payments were to be made to her and not to the children direct), but remains enforceable against his estate. The court should give effect to the terms of its own order.

P. R. Hollins for the executrix. The words "joint lives" in the order cover the whole of the order, which cannot be enforced in part only against the executrix: it was a personal order against the former husband. As a personal order it must logically come to an end on his death. The only subsisting claim against the estate (which is accepted) is for any arrears existing at the time of death.

The order was not a firm order until the children reached 21, for the husband could at any time while alive have gone back to the court to have it varied.

If section 26 (1) of the Act of 1950 allows for an order to continue after a husband's death, why should section 26 (3) be included in the statute?

[KARMINSKI J. The order is to pay until the children reach 21; section 26 (3) is to guard against accidents, such as reduction of capital, etc.]

Scott v. *Scott*,[11] in which Barnard J. refused to make absolute after the death of a husband a charging order nisi granted during his life in respect of certain arrears of alimony pending suit, supports the submission that the order came to an end on death.

Crispin in reply. The order crystallized on the husband's death in its "plight," as when a writ of sequestration has been issued before bankruptcy: *Coles* v. *Coles*.[12]

KARMINSKI J. This is an appeal by a petitioner, Mrs. Walker, formerly Mrs. Sugden, against the order of Mr. Registrar Kinsley, refusing her application that the executrix of the estate of the deceased respondent do pay out of his estate to her certain sums, namely, arrears for the maintenance of the two children of the marriage accruing between May, 1955, and September, 1956.

---

[10] [1956] P. 26; [1955] 2 All E.R. 391.

[11] [1952] W.N. 522; [1952] 2 T.L.R. 786; [1952] 2 All E.R. 890.

[12] [1956] 3 W.L.R. 861; [1956] 3 All E.R. 542.

The point raised by this appeal is a novel one to the extent that it does not appear to be covered by direct authority, and I therefore thought it right that it should be adjourned into open court for argument.

The facts which led up to the present appeal are short and uncontentious, and I can recite them briefly. The petitioner and the respondent, having been married, were divorced on the petitioner's petition. In July, 1945, the decree having been made absolute, an order for maintenance was made in her favour and in favour of the children. Not long after that order the petitioner remarried, and by an order made by consent on April 25, 1946, Mr. Registrar Long ordered that the order for maintenance made in 1945 be varied and that from April, 1946, the petitioner should have a nominal order for herself only during the joint lives of herself and the respondent. He further ordered, "that the respondent do pay or cause to be paid to the petitioner "until further order until Adam Sugden and Ann Sugden the "children issue of the marriage between the parties shall respec- "tively attain the age of twenty-one years as from May 13, 1946, "maintenance for the said children at and after the rate of £300 "per annum less tax for each child, the said sums to be payable "monthly," and varied the 1945 order accordingly. Both the petitioner and the respondent subsequently remarried. The children mentioned in the order of 1946 are respectively aged nearly 20 and 16.

It is, I think, desirable to say at once that no difficulties appear to have taken place so far as the payment of the order in favour of the children was concerned until the respondent died on June 22, 1955. Thereafter the executrix of his estate, who was in fact his widow, paid certain sums, but not the full amounts, under the order. In the result this matter has come before the court to ascertain whether or not the estate is bound to pay the sums set out in the order of 1946.

I have already said that the point raised does not appear to have been directly covered by authority. But I would like to add that my task has been very much simplified by some of the recent decisions on similar points which have dealt with matters of this kind. Briefly, the position so far as the estate of the respondent is concerned has been called into existence by the Law Reform (Miscellaneous Provisions) Act, 1934; section 1 (1) of that Act is of vital importance here. [His Lordship read the subsection and continued:] I think the first case in which this subsection came to be discussed in this Division was when Hodson J. in 1942 considered *Dipple* v. *Dipple*.[1] That was a case of a wife who had obtained a decree nisi of divorce and had applied for maintenance for herself and the child, and had indeed obtained an interim order for maintenance; thereafter certain negotiations were proceeding for permanent maintenance and security, but before the matter could be dealt with the husband died, and letters of administration were granted in respect of his estate. The matter came before the court on the question whether under those circumstances the wife could obtain an order against the husband, or former husband or personal representative to secure maintenance under section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925.[2] The application was dismissed by Hodson J. because, as he put it,[3] the wife had "merely the right to ask the court to exercise "discretionary powers in her favour." That, as Hodson J. emphasized, was something essentially different from her having an enforceable claim against the husband, and he distinguished a case which he had not long before decided (but which had not been reported)[4] where on a taxation of costs he allowed the taxation to proceed against the personal representative of a co-respondent who had died after the decree, because, as Hodson J. pointed out, the order for costs having been made against the co-respondent in his lifetime, there was an enforceable claim against him which was kept alive by the Law Reform (Miscellaneous Provisions) Act, 1934.

I have to remind myself here that the consent order made in favour of the children was made some nine years before the death of the respondent in this case.

In *Hyde* v. *Hyde*[5] a similar point was considered by Barnard J. There the successful petitioner was the wife, and she took out a summons against the executors of her late husband, the respondent, to show cause why they should not be ordered to execute a deed giving effect to an order of this court dated February, 1947. The date is important because the respondent in that case died some six weeks later, in April, 1947. It is not necessary to go through the arguments of counsel who appeared in that case and which are fully reported, but I notice with interest that Mr. Upjohn, who was leading Mr. John Latey for the petitioner, is reported to have argued[6] that "*Richards* v. *Richards and*

---

[1] [1942] P. 65.

[2] Replaced by s. 19 (2) of the Matrimonial Causes Act, 1950.

[3] [1942] P. 65, 68.

[4] *Richards* v. *Richards and Flockton* (1940). See footnote [1942] P. 68n.; 58 T.L.R. 142n.

[5] [1948] P. 198.

[6] [1948] P. 198, 200.

"*Flockton*,[7] referred to in *Dipple* v. *Dipple*,[8] establishes that "there is a cause of action where the court has once made an "order." Barnard J. in a reserved judgment considered the whole position, and referred to a decision of P. O. Lawrence J. in *Burroughes* v. *Abbott*[9] where that judge had referred to the President of this Division who in turn is reported to have asked P. O. Lawrence J. to deal with the matter in order to avoid any separate application to this court. Barnard J. pointed out that[10] "The President does not seem to have entertained any doubt that "he also had jurisdiction," and added these words, "Common "sense seems to dictate that this court should make effective its "own orders, and that is the only order I propose to make."

Lastly I turn to the decision of Sachs J. in *Mosey* v. *Mosey and Barker*.[11] There there were cross-applications resulting from the husband respondent dying before the security ordered had been satisfied, the executors of the deceased respondent seeking by a cross-application to vary the order by deleting so much of it as related to the gross sum to be secured for the child of the marriage. A number of matters were fully considered in the reserved judgment of Sachs J. which do not, I think, directly affect the point before me. But at the start of his judgment, having recited the facts, Sachs J. said this[12]: "The question raised by the application is whether the order can be enforced against the sole "executor of the husband or whether the death of the husband "results in the wife having as from that date no rights under the "order. There are two decisions since the enactment of the Law "Reform (Miscellaneous Provisions) Act, 1934, which touch "closely on the above question. The first is *Dipple* v. *Dipple*,[13] "where Hodson J. held that the right of a wife to apply for an "order under section 190 (1) of the Supreme Court of Judicature "(Consolidation) Act, 1925, was not a 'cause of action' within "section 1 (1) of the Act of 1934; accordingly where before the "death of the husband the wife had made an application under "section 190 (1), but had not reached the stage of obtaining an "order, her claim could not survive his death."

Sachs J. then referred to *Hyde* v. *Hyde*,[14] the decision of Barnard J., and added[15]: "Lord Hailsham's"—who appeared for the executor—"main and much pressed argument was that the

---

[7] [1942] P. 68n.
[8] [1942] P. 65.
[9] [1922] 1 Ch. 86; 38 T.L.R. 167.
[10] [1948] P. 198, 204.
[11] [1956] P. 26.
[12] Ibid. 39.
[13] [1942] P. 65.
[14] [1948] P. 198.
[15] [1956] P. 26, 40.

1956

SUGDEN
v.
SUGDEN.

Karminski J.

"court has here no jurisdiction to deal with a matter arising in a "divorce suit after the death of one of the parties, on the short "ground that there is no fund in court or other res upon which to "found the post-death jurisdiction. He relied in substance on "passages in pre-1934 decisions, such as *Beaumont* v. *Beaumont*.[16] But decisions and dicta before the Act of 1934 must "be looked at with care to see whether they would have been "the same today: and if *Richards* v. *Richards and Flockton* [17] is "rightly decided, as I would respectfully agree it was (cf. *In re* "*Boyd*,[18] *per* Lord Esher M.R.), the test since 1934 is not 'is "'there a res' but 'does the order create an enforceable "'claim?' Indeed, that case disposes of Lord Hailsham's above "argument and thus of his suggestion that the wife's case must "stand or fall according to whether or not the order then and "there created an equitable charge."

Sachs J. added this [19]: "Further, an order, in my view, "creates an enforceable claim if the court can and will exercise "its powers to ensure the order is enforced in relation to the "husband's assets during his lifetime. For that purpose it does "not matter whether the power is exercised by means of an "appropriate injunction, or by other means. If authority is "needed to establish that the order in the present case was, at "all material times, enforceable, then *Waterhouse* v. *Waterhouse* [20] can be relied on as showing how a court can aid a "wife, even before decree absolute, where the husband is bound "to secure to his wife maintenance out of a portion of his "property not as yet specified."

Mr. Hollins, for the husband, argued that there is, or was, no cause of action where the money claimed had not accrued due during the lifetime of the respondent, and he argued that logically an order of this kind must cease at the death. In my view that argument, though interesting, is not sound. I think the principle here is that this order made in 1946 has created an enforceable claim as against the estate.

I would at once say that the argument suggested by Mr. Hollins as to the joint lives attaching itself to that part of the order dealing with the children's maintenance has not attracted me, and I think it is unsound on the wording of the order. But the question here which I have to ask myself is whether or not this is a cause of action which attaches to the order and can be enforceable by the petitioner. This, in my view, applying the test suggested by Hodson J., is not a case of a wife who has merely a right to ask the court to exercise discretionary powers in her favour. It is, as I think, a case where there is in existence, and was during the lifetime of the husband, an enforceable claim against him. If, during his lifetime, he had failed to comply with the order of maintenance for the children the usual remedies could have been applied by execution, if necessary by attachment, to enforce the court's order. I hasten to add that no such course was ever required because the respondent complied with the order punctually and in full. But if he had failed there would have remained in the wife's hands the effective weapons of execution known to this court.

---

[16] [1933] P. 39; sub nom. *In re Beaumont Petition*, 49 T.L.R. 35.

[17] [1942] P. 68n.

[18] [1895] 1 Q.B. 611, 614.

[19] [1956] P. 26, 40.

[20] [1893] P. 284.

In my view, therefore, the answer to the summons is that the executrix of the estate is liable to pay out of the estate the sum of £202, being the arrears of the order in favour of the children outstanding.

It is not an easy case and I would like to say at once that I am obliged to counsel for the care and skill with which they have argued it. But having come to a clear conclusion, even though I am differing from the registrar, I have not thought it necessary in this case to reserve my judgment. The appeal will be allowed.

Appeal allowed.

J. B. G.

[*Note.*—The order of Karminski J., as drawn and entered, omitted the usual words "until further order."]

The executrix appealed.

R. J. A. Temple Q.C. and *P. R. Hollins* for the executrix. The court has jurisdiction to make orders for children either by way of secured provision under section 26 (3) of the Matrimonial Causes Act, 1950, formerly section 193 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, or by way of maintenance up to 21 during the joint lives of the payer and the infant payees under section 26 (1) of the Act of 1950, formerly section 193 (1) of the Act of 1925. An order of the latter kind ceases to have effect if the payer dies before the children attain 21, and is not binding on his estate. Support for that submission is to be found in the fact that section 193 (1) of the Act of 1925 provided for orders to be made on decrees of divorce or nullity or judicial separation, whereas orders under section 193 (3) were confined to divorce or nullity. It would be absurd if the court had to refuse security on a judicial separation under subsection (3) but could make an order under subsection (1) binding on the estate and all its assets. The provisions for children were equated to those for wives by section 10 (4) of the Matrimonial Causes Act, 1937, the Act which was in force when this order was made.

Secondly, the court will not enforce an order which is in terms beyond its jurisdiction. Therefore, if the order of April, 1946, extends beyond the " joint lives " ambit, the court must construe it as a " joint lives " order. That is what this court did in *Hinde* v. *Hinde*,[1] not cited to Karminski J., which covers the present case, and in which Birkett L.J. said of a similar order that it would seem to indicate that the husband was alive to fulfil his obligation.[2]

[DENNING L.J. Morris L.J. said[3] that it might be possible to construe a consent order as a contract and sue on it, but this order is not an agreement between the parties; it is an order of the court to which the parties agree, and it can be construed only in relation to the powers of the court.]

That is the present submission. This order directs the father personally to pay, and implies that he is alive to do so; moreover, a sum payable monthly, as this was, is the appropriate form for a " joint lives " order. It cannot be construed as a security order, for no security in the form of a capital asset was specified out of which the payments are to be made. Though the words " during joint lives " do not normally appear in orders for the maintenance of children, those words must be implied.

Thirdly, the words " until the children attain the age of 21 " add nothing to the effect of this order. *Thomasset* v. *Thomasset*[4] established that the court has jurisdiction to order maintenance for children up to 21. The father's liability was fully extended by the words " until further order," which indicate not only the possibility of modification but also contemplate the father being alive to apply for it. [*Sievwright* v. *Sievwright*[5] was also referred to.]

Fourthly, Karminski J. has held that an enforceable claim subsisted against this father's estate under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1; but it is submitted that

---

[1] [1953] 1 W.L.R. 175; [1953] 1 All E.R. 171.

[2] [1953] 1 W.L.R. 175, 179.

[3] Ibid. 186.

[4] [1894] P. 295; 10 T.L.R. 591.

[5] [1956] 1 W.L.R. 1452.

that Act has no application here. The order of April, 1946, stands or falls by its own terms, having regard to the jurisdiction given by the statute under which it was made. The Act of 1934 preserves only subsisting rights, and if such rights arise under the Act of 1925 or under the Matrimonial Causes Act, 1950, they are, if preserved, preserved within the ambit of the statute creating them. The cases in which section 1 of the Law Reform Act of 1934 has been held to apply—*Richards* v. *Richards and Flockton*,[6] *Hyde* v. *Hyde*[7] and *Mosey* v. *Mosey and Barker*[8]—are distinguishable as cases where an order had already been made and all that was required to perfect it was something in the nature of a ministerial act. By contrast, in *Dipple* v. *Dipple*,[9] where a wife asked for leave to obtain secured maintenance out of the estate of her late husband, Hodson J. rejected the claim as not being a "cause of action" surviving under the Act of 1934, and said that the wife's only right was to ask the court to exercise discretionary powers in her favour.[10]

[DENNING L.J. I am not sure about the word "discretionary." An action for an injunction is discretionary, but it may survive under the Act of 1934.]

Yes; but there is no cause of action for maintenance, which can only be obtained through the special machinery of the Divorce Division.

Fifthly, if the present summons is an application for the enforcement of the order of 1946 on the basis that it is valid and continues having regard to its terms, then consideration of the Law Reform Act of 1934 is irrelevant, for enforcement of payments must be confined to the statutory methods available to enforce an order for the payment of money: see *Bailey* v. *Bailey*,[11] the Matrimonial Causes Rules, 1950, r. 62, and *In re Bidie, decd.*, *Bidie* v. *General Accident Fire and Life Assurance Corporation Ltd.*[12] [*Craig* v. *Craig*[13] was also referred to.]

Sixthly, Karminski J.'s order, by omitting the words "until "further order," has radically altered the order of 1946. The executrix was not a party to the original suit; the payment cannot after the husband's death be varied from the sum specified in

---

[6] [1942] P. 68n.; 58 T.L.R. 142n.

[7] [1948] P. 198; 64 T.L.R. 105; [1948] 1 All E.R. 362.

[8] [1956] P. 26; [1955] 2 All E.R. 391.

[9] [1942] P. 65; 58 T.L.R. 141; [1942] 1 All E.R. 234.

[10] [1942] P. 65, 68–69.

[11] (1884) 13 Q.B.D. 855.

[12] [1948] Ch. 697, 703.

[13] [1896] P. 171; 12 T.L.R. 375.

C. A.
1956

Sugden
v.
Sugden.

1946; nor can the executrix make an application to vary under section 26 of the Matrimonial Causes Act, 1950, because the power to vary has been taken away: *Mosey* v. *Mosey and Barker.*[14]

Seventhly, there must be many orders in similar terms which stopped on the death of the father. If they are all now to be held enforceable, the prospect is somewhat alarming.

G. H. Crispin and *C. D. Lush* for the petitioner. This order is in terms which carry it beyond the death of the father and until the children are 21, and there is nothing in section 26 (1) of the Act of 1950 or section 193 (1) of the Act of 1925 to show that the court cannot make an order binding on the father's estate so long as the children are under 21. The wide words of subsection (1) of section 26 of the Act of 1950 give jurisdiction to make " such " provision as appears just." Nothing is said about " during " joint lives "—by contrast with section 19 (3) of the Act of 1950 (previously section 190 of the Act of 1925) which contains that limitation. The court's power to order secured provision under subsection (3) of section 26 of the Act of 1950 is additional to its power under subsection (1) to bind the estate of the father. *Ling* v. *Ling and Croker*[15] is authority for the submission that the court will entertain applications on behalf of children after the death of their father, for there the court made an order varying a marriage settlement after the father's death. The father in the present case was a solicitor with considerable capital assets; by the consent order of April, 1946, he intended to state what he was prepared to do for his children until they were 21; that is important in considering why the mother did not apply for security during his lifetime. Further, the limitation " during " joint lives " appearing in this order applies only to the provision for the wife in the first part and not to the provision for the children in the latter part. The submission in terrorem that many claims may follow if the order of Karminski J. stands is not important in this case, for the sum involved here is small in comparison with the amount of the estate.

If the court has the jurisdiction claimed, there is, as Karminski J. has held, an enforceable claim subsisting under the Law Reform Act of 1934. It is significant that though the proviso to section 1 of that Act excludes from " claims subsisting " claims under section 189 of the Judicature Act, 1925, claims under sections 190 and 193 of that Act—now sections 19 and 26 of the Act of 1950—were not similarly excluded.

---

[14] [1956] P. 26.

[15] (1865) 4 Sw. & Tr. 99.

There is very little authority to assist in answering the question: what is a cause of action?; but in *Dipple* v. *Dipple*[16] Hodson J. cited Lord Esher's definition that a cause of action is "every fact that it would be necessary for the plaintiff to prove, "if traversed, in order to support his right to the judgment of "the court."[17] That applies here, and this case also falls within the definition given by Sachs J. in *Mosey* v. *Mosey and Barker*,[18] that "if an order within its four corners lays down what is to be "done and how it is to be done, it creates an enforceable claim, "even if at the date of death everything has not yet been done."

It is said that this order may only be enforced in the ways specified in rule 62 of the Matrimonial Causes Rules, 1950, but the incorporation into those rules of the Rules of the Supreme Court may have the effect of giving a wife remedies other than those specified in rule 62. The omission of the words "until "further order" from the order of Karminski J. may have been per incuriam, and the petitioner would not object to their being inserted.

Temple Q.C. in reply. The court ought not to speculate on the intention of the parties. The proper approach to the order is to see what it means. Cases on the variation of settlements are distinguishable, for the jurisdiction of the court in such cases is exercised where property has been settled; but here there is only a personal liability on the father to pay maintenance out of income. [*Jacobs* v. *Jacobs*[19] was also referred to.]

DENNING L.J. stated the facts, read the order of April 25, 1946, and continued: The question is whether the respondent's estate after his death is liable to pay the maintenance of £300 a year less tax for the children until they are 21. Under the order, the maintenance of one shilling a year for the wife is only payable "during their joint lives." It ends, therefore, with the husband's death. But the maintenance for the children is not so limited, at any rate not in express terms. The order is "that "the said respondent do pay or cause to be paid" to the petitioner the sum of £300 a year less tax for each child. But it is to be noticed that it is only the respondent who has to pay, not his personal representatives. It is an obligation which is personal to him and ends with his death. It only subsists during his lifetime. The father is to pay only so long as he is alive to pay. A similar interpretation was put by this court on somewhat similar words in *Hinde* v. *Hinde*,[1] particularly by Birkett L.J.[2]

---

[16] [1942] P. 65.

[17] Ibid. 68.

[18] [1956] P. 26, 39–40.

[19] [1943] P. 7; 59 T.L.R. 13; [1942] 2 All E.R. 471.

If that is the proper interpretation of the order, it is the end of this case. The father fulfilled his obligations during his lifetime: and after his death there was no obligation on anyone to pay. The order does not say that his estate is to pay or that his personal representatives are to pay maintenance for the children. The obligation is at an end.

I would like to add that, if it is desired to provide for maintenance for the children after the father's death, the proper way is to order the father during his lifetime to make a secured provision for the children by putting aside a fund on their behalf. That is contemplated by section 26 (3) of the Matrimonial Causes Act, 1950. In the absence of a secured provision, I doubt whether the Divorce Court has any jurisdiction to order a man's personal representatives to pay maintenance for his children after his death. This is an additional reason for construing this order as I have done, so as to ensure that the court does not go beyond its jurisdiction.

The judge was much influenced by section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, which he thought applied so as to make the sums for maintenance continue after the father's death. I do not agree with that view. The section only applies to "causes of action" which subsist against the deceased at the time of his death. The legislature had particularly in mind causes of action in tort which used to fall with the death of either party under the old common law maxim actio personalis moritur cum persona. "Causes of action" in the section means, I think, rights which can be enforced—or liabilities which can be redressed—by legal proceedings in the Queen's courts. These now survive against the estate of the deceased person. "Causes of action" are not, however, confined to rights enforceable *by action*, strictly so called—that is, by action at law or in equity. They extend also to rights enforceable by proceedings in the Divorce Court, provided that they really are rights and not mere hopes or contingencies. They include, for instance, a sum payable for costs under an order of the Divorce Court, or a right to a secured provision under an order already

[1] [1953] 1 W.L.R. 175; [1953] 1 All E.R. 171.

[2] [1953] 1 W.L.R. 175, 179.

made against a man before his death: see *Hyde* v. *Hyde*[3] and *Mosey* v. *Mosey and Barker*.[4]

It must be noticed, however, that the section only applies to causes of action " subsisting against " the deceased on his death. This means that the right or liability must have accrued due at the time of his death.

In an action in the Queen's Bench there is usually no difficulty in determining when the right or liability accrued due: but there is more difficulty in proceedings in the Divorce Court. In that court there is no right to maintenance, or to costs, or to a secured provision, or the like, until the court makes an order directing it. There is, therefore, no cause of action for such matters until an order is made. This view of proceedings in the Divorce Court is supported by the decision of my brother Hodson L.J. (then Hodson J.) in *Dipple* v. *Dipple*,[5] where he pointed out that all that the wife had was the hope that the court would in its discretion order a secured provision. She had no right to it at all until the order was actually made, and hence she had no cause of action at his death. While I entirely agree with that decision, I do not think that the fact that a cause of action is discretionary automatically takes it out of the Act. An injunction is a discretionary remedy, but, if a cause of action for an injunction subsisted at the death, I should have thought it would survive against the personal representatives. The only thing which takes a case out of the Act is the absence of an enforceable right at the time of death.

I would add that, in divorce proceedings, in order that the cause of action should subsist at the death, the right under the order must itself have accrued at the time of death. Thus a cause of action subsists against a husband for arrears of maintenance due at his death, but not for later payments.

In the present case, there was no right or liability subsisting against the father at the time of his death. He had paid everything up to that time. If there had been any arrears of maintenance payable by him at that time, then no doubt they would be payable by his estate after his death under section 1 of the Act of 1934. But there were no arrears. There was nothing, therefore, to come within the Act of 1934 at all. The right to maintenance after his death must come from the terms of the order itself or not at all: and, as I have said, the order on its true interpretation gives no such right.

---

[3] [1948] P. 198; 64 T.L.R. 105; [1948] 1 All E.R. 362.

[4] [1956] P. 26; [1955] 2 All E.R. 391.

[5] [1942] P. 65; 68 T.L.R. 141; [1942] 1 All E.R. 234.

For these reasons, I think that Karminski J. was in error, and I would allow the appeal.

HODSON L.J. I agree. I think it is unnecessary to consider the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, section 1 (1); but perhaps I may be permitted to make a word of explanation about *Dipple* v. *Dipple*,[6] a decision of my own which has been subsequently referred to in other cases. I held that the right of a wife, to whom a decree absolute of divorce was granted, to apply for secured maintenance under section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, was not a cause of action against her husband within the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934. As at present advised, I adhere to that view. Some emphasis has been placed on the word "discretionary" which I used in my judgment; but I fully agree with Denning L.J. that that may be a misleading adjective. The question really is whether there is a cause of action or not, and whether the court is asked to exercise powers is the question which is relevant—not whether those powers are discretionary. If I have misled anybody by the use of the word "discretionary"—after all it was apt in that case—I regret having used such a word.

So far as this case is concerned, I think it depends entirely on the construction of the order. I agree with the first contention of Mr. Crispin that the words "during their joint lives" appearing in the first part of the order do not control directly the payments to the children which we are now considering, and one has to consider the order in favour of the wife for the maintenance of the children without the assistance of the words "during their joint lives" appearing in the third line of the order. I think, however, that the conclusion is the same, and that the observations of Birkett L.J. in the somewhat parallel case of *Hinde* v. *Hinde*[7] are relevant. The order in that case directed "that Walter Stanley Hinde the respondent do pay or "cause to be paid." That, said Birkett L.J.,[8] would seem to indicate that the husband is alive to fulfil his obligation. Nothing is said that contemplates his death or what is to happen to the provision for maintenance in that contingency. Similarly, in this case the order is "that Thomas Edward Sugden, the

---

[6] [1942] P. 65.

[7] [1953] 1 W.L.R. 175.

[8] Ibid. 179.

"respondent" (omitting the provision for the maintenance of the wife) "do pay or cause to be paid to the said petitioner until "further order until Adam Sugden and Ann Sugden the children "issue of the marriage between the parties shall respectively "attain the age of 21 years as from May 13, 1946, maintenance for "the said children at and after the rate of £300 per annum less "tax for each child." That order connotes periodical payments to be paid by a living man to the petitioner, and in my view it connotes payments to be made during joint lives. It is quite true (as Mr. Crispin pointed out) that nothing is added to or subtracted from the order by the words "attain the age of 21 "years." Mr. Crispin relies on that phrase as showing that the order might extend beyond the lifetime of the payer. But in my judgment they do not have that effect. Indeed, the order would have exactly the same effect if those words did not appear, and they do not assist me in the construction of the order at all. The jurisdiction of the court to make maintenance orders for children extends until the children attain the age of 21 years, and there is nothing gained by stating in the order what the jurisdiction is, which is already sufficiently precise if it contains the words "until further order." Those words "until further "order" assist me to the construction which I have reached, because they are put there in order to cover the event of a change of circumstances—which may, of course, include a change of circumstances of the children, but may also include a change of circumstances of the payer, the man out of whose income prima facie the payment is to be made. They may also include a change of circumstances of the recipient—that is, the petitioner. There is no room, in my judgment, for a construction more extensive than joint lives.

That is sufficient to dispose of this appeal. I might add, since the matter has been discussed, that I know of no authority for the proposition that an order of this kind could be made by a court upon a man to pay to his wife periodical payments extending beyond his death. Accordingly, if an order purported to be made in that form under the provisions of the statute (now section 26 of the Matrimonial Causes Act, 1950), such an order would, prima facie, be without jurisdiction; and the observations of Morris L.J. in *Hinde* v. *Hinde* [9] would be directly applicable— "The possibility of asserting in an action, and of seeking to "prove and establish, that there was a contract as alleged by the

---

[9] [1953] 1 W.L.R. 175, 186.

"wife, can neither be excluded nor encouraged"; because, of course, it would be perfectly open to a man to covenant to pay to his wife a sum of money by periodical payments extending beyond his life: such a covenant could be binding upon his estate: and if he sought to put such a promise in the form of a consent order it would not of itself presumably prevent her suing on such a contract. But that question does not fall to be considered in this case.

MORRIS L.J. I entirely agree. It seems to me that this case can primarily be decided on a construction of the order that was made on April 25, 1946. I read the words in that order as involving an obligation on the husband which did not extend beyond the time of his death. The words are, "and that the "said respondent do pay or cause to be paid." I think those words contemplate that the respondent (the husband) would be alive to fulfil his obligation. The payments were to be made monthly. I think the fact that they were to be paid monthly is some further indication—perhaps slight by itself—pointing to the same conclusion, namely, that the obligation was one upon the husband himself during his lifetime.

Taking that view as a matter of construction, it is perhaps strictly not necessary to express an opinion on other matters; but I also very much doubt whether there would be power in the court to make an order which would extend so as to bind a man's estate to make periodic payments. It seems to me that there is no room for the application of the Law Reform (Miscellaneous Provisions) Act, 1934, in this case. I agree that the appeal should be allowed.

Appeal allowed.
Order of Karminski J. set aside.

Solicitors: *Blundell, Baker & Co. for T. E. Sugden, Scott & Horsfall, Keighley; Haslewood, Hare, Shirley Woolmer & Co.*

M. M. H.

M. *v.* M. (ORSE. B.).

1956
Nov. 1, 2.

Karminski J.

Husband and Wife—Nullity—Incapacity—Curability—Impracticability of consummation.

At the hearing of a husband's petition for nullity the wife admitted that some three years previously she had received medical advice that an operation for dilatation was required, but that she had taken no further steps. Medical evidence was given and accepted that the marriage had not been consummated and that the wife was suffering from vaginismus, but that certain treatment offered a possible chance of success in curing her incapacity.

On the submission by counsel for the wife that, since there was a possibility of a cure, the suit should be adjourned for the wife to undergo treatment:—

Held, that the wife was suffering from a serious condition as to which there was a mere possibility of successful treatment, and the history of the case showed that she had made no effort to remedy a defect, the existence of which she knew, by undergoing the operation of dilatation; if a marriage could not be consummated the basis of the interference of the court was not the structural defect, but the impracticability of consummation; applying that test the wife was incapable of consummating the marriage and a decree of nullity should be granted.

G—— v. *G——* (1871) L.R. 2 P. & M. 287 applied.

S. v. *S.* (*orse. C.*) [1956] P. 1; [1954] 3 All E.R. 736 distinguished.

NULLITY PETITION.

The marriage was celebrated in May 1945. In 1953 the husband, who alleged that the marriage had never been consummated, left the wife. The parties continued to see each other from time to time and the wife made efforts to induce the husband to return. He was adamant in his view that there was no prospect of establishing successful sexual relations if he did so, and in July, 1954, he filed a petition praying for a decree of nullity on the ground of the wife's incapacity, or, alternatively, her wilful refusal to consummate the marriage. The allegation of wilful refusal was not, however, pressed at the hearing. The wife, by her answer of March, 1955, denied the allegations made in the petition and charged the husband with cruelty and adultery.

At the hearing of the issue as to nullity, which was tried first, the judge accepted the evidence of the husband that he had attempted unsuccessfully to have sexual intercourse with the wife over a period of years and that, when he left her in 1953, the marriage had never been consummated. He rejected the evidence of the wife that some modest degree of penetration had been achieved. He also accepted the husband's evidence that, some years before he left the wife, she had visited a local doctor in Hove on his suggestion. The wife agreed that in the course of an examination by a doctor in the Middlesex Hospital in 1953 she had been told that some sort of an operation was required because she was so small but that she had not, in fact, taken any steps to undergo treatment.

Medical evidence was given by one of the medical examiners of the court, Mr. Frank Cook, who, together with Dr. Chamberlain, another medical inspector, examined the parties in April, 1956. The husband was found to be a normal, healthy man of the usual development so far as the genital organs were concerned and apparently capable. The medical inspector was quite willing to accept that the wife genuinely believed that sexual intercourse had taken place but was quite clear that this was not so. He added that he could not exclude the possibility of vaginismus in the case, but could not say whether it existed because he was not able to examine as far as that. He expressed the view that a mere operation of dilatation would not cure vaginismus if it had existed.

Dr. Hamilton, who had examined the wife in September, 1956, at the same hospital, gave evidence and produced the notes of his predecessor who had examined the wife in 1953. According to his evidence Dr. Hamilton came to the conclusion that the wife was suffering from a very serious condition of vaginismus, and took the view that the treatment applicable was dilatation, to be followed up by psychiatric or psychological treatment, and that such treatment would have a possible chance of success.

The possibility of the treatment suggested by Dr. Hamilton was not put to Mr. Cook, who, however, took the view that dilatation of itself would not assist.

Counsel for the wife, in his concluding speech, submitted that the proper course was to adjourn the matter in order to see whether the wife's incapacity could be cured. The case is reported only upon this point.

L. Pearl for the wife, in support of the application for an adjournment. Upon the evidence there is a possibility that an operation and medical attention may render the wife capable and an adjournment is now sought for that purpose. In *S.* v. *S.* (*orse. C.*),[1] a wife having undergone, during an adjournment to enable the Queen's Proctor to present argument, an operation which rendered her capable, it was held that consummation was no longer a practical impossibility and the husband's petition for a decree of nullity was dismissed. The test of practicability laid down by Lord Penzance in *G——* v. *G——* [2] was applied in that case. As the only difference between that and the present case is one of degree it is submitted that consummation of the marriage in the present case is a practical possibility and that, in the circumstances, an adjournment should be ordered.

---

[1] [1956] P. 1; [1954] 3 All E.R. 736.

J. A. P. Hazel (*H. S. Law* with him) for the husband, opposing the application. It is idle for counsel for the wife to submit, at this stage, that she should have an opportunity to make herself apta vira. Such an indication of willingness would have been too late in 1953 when the husband made it clear that he was no longer willing to resume living with the wife. Since then she has made allegations of adultery and cruelty against him.

[KARMINSKI J. The suggestion has been made at a very late stage. The wife was advised as to the possibility of an operation as far back as 1953. According to the decision of Lord Penzance in *G——* v. *G——* [3] is not practicability all that I have to consider?]

That is the sole test, and it is submitted that there is now no practical possibility that this marriage will be consummated.

KARMINSKI J. referred to the facts and the evidence, stating that he was satisfied that the marriage had never been consummated owing to the wife's incapacity, but rejecting the alternative charge of wilful refusal, and continued: In fact this wife has never put the possibility of a cure to the test. It is suggested that there is still time, and that, as there is a possibility of a cure, I ought not to pronounce a decree on the ground that she was not incapable if there is a reasonable prospect of her incapacity being cured. But I have to apply my mind to the history of this case. The wife knew very well, before the separation, that her husband was, at any rate, not satisfied with the sexual intercourse between them, and I have not the slightest doubt, having heard the medical evidence, that the husband had grave cause for his anxieties and for his complaints in that regard.

The wife was examined by a doctor in the Middlesex Hospital in 1953 and she accepted that she was told that some sort of operation was required because, as she told me, she was so small. But nothing at all was done by her; no effort was made on her part to undergo any treatment, although it is not suggested that

[2] (1871) L.R. 2 P. & M. 287.

[3] Ibid.

the operation of dilatation is a serious one or one accompanied by any real difficulty or danger to her life or health.

I think that her suggestion of undergoing an operation was very much of an afterthought and not a very genuine one. It was not, as I have said, even put to Mr. Cook, so that, with his wealth of experience in these matters, he might at least have expressed a view to the court.

I have to deal with the matter, as Lord Penzance pointed out in *G*—— v. *G*——,[1] by looking at the practical aspect. If the marriage cannot be consummated, as Lord Penzance explained,[2] the basis of the interference of the court is not the structural defect but the impracticability of consummation. He said [3] that the question was a practical one, and he asked himself this question [4]: ". . . I cannot help asking myself what is the "husband to do in the event of his being obliged to return to "cohabitation in order to effect the consummation of the "marriage?"

It is right that I should approach the matter from the practical point of view. As I have said, this wife knew about the defects from the doctor at the Middlesex Hospital as far back as 1953, if, indeed, she did not know something of it from the doctor I believe she saw in Hove much earlier. She has taken absolutely no step.

It is true that in *S.* v. *S.* (*orse. C.*) [5] a decree was refused because, during an adjournment of the hearing for argument by the Queen's Proctor, the wife underwent the small operation of hymenectomy; but that was a case where, on the medical evidence, it was clear that the only barrier to true consummation was an unduly thick and resistant hymen.

Here I have clear evidence of vaginismus. The wife heard something about her condition but took no step. I apply the practical test: I find that this wife is incapable of sexual intercourse with this husband.

In the result, therefore, there will be a decree nisi of nullity on the prayer in the petition, on the ground of incapacity. The prayer in the answer will be rejected.

Solicitors: *Barnett & Barnett; Gerald Samuels & Shine.*

E. J.

---

[1] (1871) L.R. 2 P. & M. 287.

[2] Ibid. 291.

[3] Ibid.

[4] Ibid.

[5] [1956] P. 1; [1954] 3 All E.R. 736.

TRISHNA (OWNERS, MASTER AND CREW) *v.* M.S.C. PANTHER AND ERICBANK (OWNERS).

1957
Jan. 16, 17, 18; *Feb.* 4.

Willmer J.

THE M.S.C. PANTHER AND THE ERICBANK.

[1955 T. No. 2227.]

Shipping—Collision—Tug and tow—Negligence of crew of tug outside province of pilot of tow—Damage to third vessel—Liability of regular employer or hirer—All three vessels to blame—Separate and distinct faults of tug and of tow—Division of loss—Maritime Conventions Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 1.

Master and Servant—Employment of servant of another—Employment pro hac vice.

The steam barge *Trishna,* while inward-bound up the Manchester Ship Canal, started to pass the outward-bound *Ericbank* in an improper place in the canal. The *Ericbank* improperly failed to signal to her stern tug that the *Trishna* was being passed, and, when the *Trishna* had proceeded halfway down the length of the *Ericbank,* the stern tug of the *Ericbank,* without orders from that vessel, swung out on her port quarter and blocked the passage of the *Trishna.* The *Trishna* was unable to take off her way completely and collided with the tug, both vessels sustaining a small amount of damage. The port propeller of the tug was improperly kept revolving, and, by striking the *Trishna* several times and holing her, caused her subsequently to sink. By the terms of the towage contract between the *Ericbank* and the tug, the crew of the tug were deemed the servants of the tow:—

Held, (1) that the question whether the regular employer of the crew of the tug or the hirer of the tug was liable to the owners of the *Trishna* for the negligence of the tug's crew did not depend on the terms of the towage contract concluded between the tug and tow, but on the question which employer had the right to control the crew as to the manner in which they were to perform their duties.

Mersey Docks and Harbour Board v. *Coggins and Griffiths* (*Liverpool*) *Ltd.* [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345 applied.

(2) That those in charge of the navigation of the tow had not acquired a sufficient degree of control over the crew of the tug for the manoeuvre of stopping the port engine of the tug to be within the province of those in charge of the tow to order, and that, accordingly, as regards this faulty manoeuvre, the crew of the tug remained the servants of their regular employers and were not to be regarded in law as the servants of the tow.

Mersey Docks and Harbour Board v. *Coggins and Griffiths* (*Liverpool*) *Ltd.* (supra) applied.

(3) That the faults of the tug and tow were distinct and separate, and accordingly, section 1 of the Maritime Conventions Act, 1911,

1957

THE PANTHER AND THE ERICBANK.

applied, and it was the duty of the court to apportion the blame between all three vessels.

The Socrates and The Champion [1923] P. 76 distinguished.

(4) That, since it was not possible to establish different degrees of fault between the *Trishna* and the *Ericbank*, section 1 (*a*) of the Maritime Conventions Act, 1911, applied and as between those vessels liability must be apportioned equally; and that the *Trishna* and *Ericbank* were to blame in the proportion of one quarter each and the tug as to one half.

Semble, the crew of the tug would be deemed the servants of the tow if the faulty manoeuvre were one within the province of those in charge of the tow, e.g., if the tug failed to carry out an order, or negligently executed without orders a manoeuvre which it was within the province of those in charge of the tow to order.

ACTION.

On December 31, 1954, the steam barge *Trishna* was in collision with the twin-screw motor-tug *M.S.C. Panther*, which was at the material time acting as the stern tug of the steamship *Ericbank*. The collision occurred in the vicinity of the Old Slipway at Ellesmere Port in the Manchester Ship Canal. The *Trishna*, inward-bound and following astern of the steam-barge *Agnes* at a speed of about six knots, sounded two signals of one long blast and reduced her way after sighting the *Ericbank*, which was approaching at a slow speed and rounding a bend in the canal. The *Trishna* started to pass the *Ericbank* port to port in breach of bye-law 15[1] of the Manchester Ship Canal Company's Bye-laws, in that the place in the canal was an improper place to pass another vessel by reason of a bend in the canal, a dredger with a barge alongside being moored on the north side of the canal, and there being only shallow water on the south side of the canal. The *Ericbank*, in breach of bye-law 6[2] and the Schedule to the bye-laws, failed to warn her stern tug that the

---

[1] Manchester Ship Canal Company's Bye-Laws: "15. When vessels navigating the canal and proceeding in opposite directions are "approaching one another each vessel "shall be navigated slowly and with "caution and shall keep to her own "starboard side, so as to pass with "safety port side to port side.

"When two vessels proceeding in "opposite directions and about to "meet are approaching a dredger ". . . or any other place in the "canal where it is not prudent or "seamanlike for them to attempt to "pass each other, the inward-bound "vessel shall give way until passed "by the outward-bound vessel. . . ."

[2] Manchester Ship Canal Company's Bye-Laws: "6. All vessels "within the harbour shall carry, use, "observe and comply with signals in "accordance with these bye-laws and "the Schedule hereto."

In the Schedule is provided:

"10. One long, one short and one "long. (To stern tug)—'Am about "'to pass another vessel'."

1957

THE PANTHER AND THE ERICBANK.

Trishna was being passed. The *Agnes* safely passed the *Ericbank* and, when the *Trishna* was half-way down the side of the *Ericbank*, the *M.S.C. Panther*, without orders from her tow and on her own initiative, swung out on the port quarter of the *Ericbank* in order to pull the stern of her tow further clear of the dredger and give more room to a small craft approaching down the canal with the intention of passing between the *Ericbank* and the dredger. The *Trishna* almost managed to take off her way before the collision, but, at about the same time as her starboard bilge touched the ground, collided with the *M.S.C. Panther*, which also carried very little way. Both vessels suffered only a small amount of damage from the first contact, but the propeller of the *M.S.C. Panther* was kept revolving and cut into the *Trishna*, holing her and causing her subsequently to sink.

The plaintiffs, the owners of the steam barge *Trishna*, her master and crew suing for their lost effects, and the owners of the cargo lately laden on board the *Trishna*, claimed that the collision was solely caused by the improper and negligent navigation of those on board the *M.S.C. Panther* and the *Ericbank*. The defendants, the owners of the *M.S.C. Panther* and the owners of the *Ericbank*, denied negligence, and the owners of the *M.S.C. Panther* counterclaimed against the plaintiffs, alleging that the collision was solely caused by the improper and negligent navigation of those on board the *Trishna*.

J. V. Naisby Q.C. and *Derek H. Hene* for the plaintiffs. The reason for the *Trishna* coming into contact with the *M.S.C. Panther* was the failure of the pilot of the *Ericbank* to sound the prescribed signal warning the stern tug that the *Trishna* was being passed. The *Ericbank* is also to blame in that her pilot caused or allowed the stern tug to get out on the port quarter blocking the *Trishna's* passage. The owners of the *Ericbank* are also responsible for the tug keeping her port propeller revolving.

K. S. Carpmael Q.C. and *J. B. Hewson* for the defendants. The *Trishna* is alone to blame for this collision. The owners of the *Ericbank* are not necessarily responsible for the wrongful acts, if any, of the *M.S.C. Panther* in getting on to the port quarter of the tow or in keeping her port propeller revolving. A contractor's servants do not necessarily become the servants of the hirer when a tug is towing a vessel: Marsden's Collisions at Sea, 10th ed., p. 206. Before it is possible to ascertain who is liable for the wrongful act it is necessary to ascertain who has control over the method whereby the act was performed: *Mersey Docks*

1957

THE PANTHER AND THE ERICBANK.

and Harbour Board v. *Coggins and Griffiths* (*Liverpool*) *Ltd.*,[3] *per* Lord Porter. In this case the pilot of the *Ericbank* did not have sufficient control over the crew of the *M.S.C. Panther* for the crew of the tug to become the servants of the tow with regard either to the manoeuvre of the tug getting on to the port quarter of the *Ericbank* or to the port propeller of the tug being kept revolving. [Salmond on Torts, 11th ed., p. 102, was also referred to.]

J. V. Naisby Q.C. in reply. The owner of the tow is liable for the wrongful acts of the crew of the tug, since the crew of the tug are deemed in law the servants of the tow. Alternatively, it is submitted that the pilot of the tow had sufficient control over the crew of the tug for the tug's crew to become the servants of the tow: *The Polartank*,[4] *per* Willmer J. The pilot of the *Ericbank* had the right and the duty to control the method whereby the tug performed the towage, and, accordingly, the *Ericbank* is liable for the tug getting on to her port quarter and coming into contact with the *Trishna*. It is submitted that both defendants are to blame. [Marsden's Collisions at Sea, 10th ed., pp. 207–209, and *The Margaret*[5] were also referred to.]

Two nautical assessors sat with the judge.

Cur. adv. vult.

Feb. 4. WILLMER J. read the following judgment in which he stated the facts and found the *Trishna* to blame for her breach of the rules of good seamanship and bye-law 15, in that she passed the *Ericbank* in a place where it was not prudent or seamanlike to pass another vessel, and also for passing the *Ericbank* at such a speed that she was unable to bring herself up on sighting the *M.S.C. Panther*. His Lordship found the *Ericbank* to blame for breach of the rules of good seamanship and bye-law 6, in that she failed to warn the *M.S.C. Panther* that the *Trishna* was being passed. His Lordship found the *M.S.C. Panther* to blame for not stopping her port engine in due time and causing her revolving port propeller to strike the *Trishna*. His Lordship continued: It was the fact of the propeller continuing to revolve under power that caused the grievous damage to the *Trishna*, and converted what would otherwise have been a trivial bump into something in the nature of a disaster. In my judgment, the largest single factor contributing to the damage was this fault on the part of the *Panther.*

---

[3] [1947] A.C. 1, 17; 62 T.L.R. 533; [1946] 2 All E.R. 345.

[4] (1948) 82 Ll.L.Rep. 108, 125.

[5] (1881) 6 P.D. 76.

This fault was a fault on the part of the mate in charge of the *Panther.* It has been argued for the plaintiffs that the defendants, the owners of the *Ericbank*, are liable for that fault, first, because in law the crew of the tug are to be regarded as the servants of the owners of the tow, and secondly, because on the facts it is contended that it was within the province of the pilot on board the *Ericbank* to order the tug's engines to be stopped. So far as the latter point is concerned, it is, I think, unarguable. No pilot can possibly be expected to control the individual engine manoeuvres of his two tugs. The evidence shows that in practice the detailed manoeuvres of the tug are, and must be, left to the discretion of the tug master, the duty of the pilot being confined to giving general directions, such as to start or stop towing, or to tow in this or that direction. I do not see how a pilot on the bridge of a large ship can possibly be expected to direct the engine movements of a stern tug, operating some three or four hundred feet behind his back, and mostly out of sight, or even to know how the engines of the tug are working at any particular moment.

Equally, the contention that the crew of the tug became in law the servants of the owners of the *Ericbank*, so as to make the latter liable for the negligence of the mate of the *Panther*, will not, in my judgment, bear examination. The terms of the towage contract between the owners of the *Ericbank* and the owners of the *Panther* have not been proved before me; but I am prepared to assume that, as between themselves, these parties agreed that the crew of the tug should be deemed to be the servants of the owners of the tow. But, as against a third party who is injured by the act of a servant, the question which of two possible masters is liable (the regular employer or the temporary employer to whom the servant is loaned) does not depend on the terms of the contract made between the respective employers; it depends upon which employer has the right to control the servant, not only as to what he is to do, but as to the way he is to do it. Moreover, it has been held that where the servant of one employer is temporarily loaned to another, it requires cogent evidence to prove that the latter has acquired such a degree of control over the servant as to render him, rather than the regular employer, liable in the event of negligence on the part of the servant. This is the effect of the decision of the House of Lords in *Mersey Docks and Harbour Board* v. *Coggins and Griffiths*.[1] I cannot do better than refer once again to a passage in the speech of Lord Porter, part of which I cited in *The Polartank* [2] when a similar point was argued before me: "Many factors "have a bearing on the result. Who is paymaster, who can "dismiss, how long the alternative service lasts, what machinery "is employed, have all to be kept in mind. The expressions "used in any individual case must always be considered in "regard to the subject matter under discussion but amongst "the many tests suggested I think that the most satisfactory, "by which to ascertain who is the employer at any particular "time, is to ask who is entitled to tell the employee the way "in which he is to do the work upon which he is engaged. If "someone other than his general employer is authorized to do "this he will, as a rule, be the person liable for the employee's "negligence. But it is not enough that the task to be performed "should be under his control, he must also control the method of "performing it. It is true that in most cases no orders as to "how a job should be done are given or required: the man is "left to do his own work in his own way. But the ultimate "question is not what specific orders, or whether any specific "orders, were given but who is entitled to give the orders as "to how the work should be done. Where a man driving a "mechanical device, such as a crane, is sent to perform a task, "it is easier to infer that the general employer continues to "control the method of performance since it is his crane and the "driver remains responsible to him for its safe keeping. In the "present case if the appellants' contention were to prevail, the "crane driver would change his employer each time he embarked "on the discharge of a fresh ship."

It seems to me that what applies to a crane and its driver should apply equally to a tug and its master or officer in charge. Accordingly, applying the principles there stated to the facts of this case, I find myself quite unable to hold that the crew of the *Panther* became in law the servants of the owners of the *Ericbank*, so as to render the latter, and not the former, liable for a faulty manoeuvre within the province of the man in charge of the tug. The position would, I apprehend, be different if the faulty manoeuvre were one within the province of the pilot or officer in charge of the tow, e.g., if the tug failed to carry out an order, or negligently executed without orders a manoeuvre which it was within the province of those in charge of the tow to order. Here, however, the faulty manoeuvre of failing to stop the port propeller in time was a matter which concerned the tug alone and not the tow, and in such circumstances I hold that the liability for the negligence of the mate of the *Panther* rests with his regular employers, the owners of the *Panther*.

---

[1] [1947] A.C. 1, 17; 62 T.L.R. 533; [1946] 2 All E.R. 345.

[2] (1948) 82 Ll.L.Rep. 108, 125.

In the result, therefore, the damage caused in the present case resulted partly from the negligence of the *Trishna* and the *Ericbank*, which combined to bring about the contact between the *Trishna* and the *Panther*, and partly from the negligence of the mate of the *Panther* in failing to stop his port propeller in time. All three vessels being guilty of faults contributing to the damage, it follows that section 1 of the Maritime Conventions Act, 1911, applies. That means that the *Trishna* is not in the position of an innocent party so as to be entitled to recover her damages in full against either of two wrong-doers. All three being at fault the damage must be apportioned.

In *The Socrates and The Champion*,[3] a decision subsequently reversed on the facts by the Court of Appeal, Hill J. refused to apportion the liability between tug and tow in a case where the tug and tow were held partly to blame for a collision between the tug and a third ship. Instead he held the tug and the tow jointly and severally liable for a moiety of the damage sustained by the other ship. It seems to me, however, that that case is distinguishable, because there the tug and tow were held in fault for jointly participating in a negligent operation (namely, coming out from a dock into the River Thames at an improper time). Here the faults which I have found against the *Ericbank* and *Panther* respectively are quite distinct and separate. I conceive it to be my duty, therefore, to consider the relative gravity of their respective faults and to apportion the blame between all three vessels.

I confess that I have found this by no means an easy problem, and in approaching it I have reminded myself of what was said by Scott L.J. in *The Buccinum*[4]: "On the question "of apportionment, one has to remember that the law of "apportionment, under the Maritime Conventions Act, is not "one of distribution of moral blame, but of a comparative "appreciation of the degree in which the respective faults of "the vessels in fault have contributed to the result." It is true that this was said in the course of a dissenting judgment, but there can, I think, be no doubt as to the correctness of the principle stated. In the present case, as a matter of causation, the damage resulted from a combination of the negligence of the *Trishna* and the *Ericbank*, on the one hand, in producing the contact, with the negligence of the *Panther*, on the other hand, in keeping her propeller working. I think that I shall not be doing any injustice if I say that these two causes operated to an equal extent. That involves that the *Panther* must be held in fault to the extent of one half.

---

[3] [1923] P. 76.

[4] (1936) 55 Ll.L.Rep. 205, 218.

As between the *Trishna* and the *Ericbank*, it is no easy matter to determine in what proportions I should distribute the fault in bringing about the contact between the *Trishna* and the *Panther*. Like the Elder Brethren, I take a serious view of the fault of the pilot of the *Ericbank* in failing to give any warning to the *Panther* (whether by the prescribed signal or otherwise) of the impending danger caused by the approach of the *Trishna*. The result was to allow the *Panther* to fall into something in the nature of a trap. In favour of the *Trishna* it can be said that her action, albeit in breach of bye-law 15 and in breach of the dictates of good seamanship, did not constitute a very serious fault. She was not proceeding at any great speed, and when she embarked on the manoeuvre of passing the *Ericbank* there was apparently a clear way through. She was only executing a manoeuvre similar to one which had just been successfully completed by the *Agnes*. Although, as I have held, the *Trishna* was not entitled to expect that the way would remain clear, or that her manoeuvre would not in any circumstances be hampered by the *Ericbank's* stern tug, it would be difficult, I think, to say that it was reasonably foreseeable by those in charge of the *Trishna* that the consequence of her manoeuvre would be quite so calamitous. This consideration is not without importance, because the degree of blame must depend to some extent at least upon the degree of damage reasonably foreseeable. But the same thing, it seems to me, can be said in relation to the fault of the pilot of the *Ericbank*. Could he reasonably foresee that the result of his neglect to give a warning signal to his stern tug would be quite so disastrous? The fact is that the degree of damage occasioned here was by no means likely; this is a case in which, unhappily, the improbable has in fact occurred.

In all the circumstances, I have come to the conclusion that this is a case to which proviso (*a*) to section 1 of the Maritime Conventions Act applies, that as between the *Trishna* and the *Ericbank* it is not possible to establish different degrees of fault,

1957

The Panther and The Ericbank.

Willmer J.

and that, as between them, the liability should be apportioned equally. The result is that I find the *Trishna* to blame to the extent of one quarter, the *Ericbank* to blame to the extent of one quarter, and the *Panther* to blame to the extent of one half. That means, I apprehend, that the *Trishna* on her claim is entitled to recover a quarter of her damage against the *Ericbank* and (subject to limitation of liability) half against the *Panther*, while the *Panther* on her counterclaim is entitled to recover a quarter of her damage against the *Trishna*.

Judgment for the plaintiffs for one half of their claim against the first named defendants and for one quarter of their claim against the second named defendants.

Judgment for the first named defendants for one quarter of their counterclaim against the plaintiffs.

Solicitors: *Batesons & Co., Liverpool; Weightman, Pedder & Co., Liverpool.*

A. S-R.

GILL *v.* GILL.

1956
July 25.

Karminski J.

Husband and Wife—Divorce—Decree—Disclosure of petitioner's adultery after granting of decree nisi but before decree absolute—Proper course to be taken.

A wife in an undefended divorce suit failed to disclose her adultery to her solicitors until after the granting of a decree nisi but before the decree had been made absolute. Upon the subsequent issue of a summons on her behalf which was also served upon the Queen's Proctor asking for leave to amend her petition to include a prayer for the exercise of the court's discretion and to file a discretion statement:—

Held, (1) that the proper and more usual procedure in such circumstances is to bring the matter to the attention of the Queen's Proctor and to allow him the opportunity of pursuing such inquiries and taking such steps thereon as might subsequently be directed by the Attorney-General.

(2) That although there would appear to be no rule of procedure to prevent a summons of the present nature coming before

the court or being acted upon if the court thought fit, the proper course, in the circumstances, was to dismiss the summons and leave the matter to take such course as the Queen's Proctor thought fit.

SUMMONS for leave to amend a petition, to file a discretion statement and for the pronouncing of a decree absolute.

On January 24, 1956, a petition was presented by the wife in which she sought a dissolution of her marriage with the husband on the ground of his desertion. There was no prayer for discretion. The suit was undefended, and on April 19, 1956, it came on for hearing before Judge Armstrong, sitting as a special commissioner at Bournemouth, who pronounced a decree nisi on the ground of desertion.

At the hearing of the summons the court was satisfied, on the evidence, that before the proceedings were started the wife had been closely questioned by her solicitor as to whether or not she had committed adultery, and had informed him that she was innocent of any adultery during the marriage.

Subsequent to the pronouncement of the decree nisi, and before a decree absolute had been obtained, the wife for the first time disclosed to her solicitors that she had committed adultery in about September, 1955 (before the presentation of her petition), with a man in Canada, where she was then staying or residing, on a number of occasions. The court was further satisfied that, although the wife's denial of adultery prior to the proceedings might have been true at the time she gave it, she did, in fact, commit adultery before the proceedings were started, but failed, deliberately, to disclose it to her solicitors.

On July 2, 1956, a summons was issued on behalf of the wife, who was then in Canada, seeking leave to amend her petition to include a prayer for discretion and to file a discretion statement. The application that the court should pronounce a decree absolute was not proceeded with at the hearing. The summons was supported by an affidavit dated June 21, 1956, in which the wife admitted that she had failed to reveal her adultery to her solicitors and apologized for the omission. It appeared that the wife was pregnant when the proceedings relating to the summons were initiated, but that the child had been born before the summons was heard.

On July 5, 1956, the wife's solicitors informed the Queen's Proctor of her disclosures.

Colin Duncan for the Queen's Proctor. This was a case of desertion, and since the commissioner who granted the decree was unaware of the wife's adultery, he was unable to apply his mind to the vital question upon an issue of desertion: did the wife's adultery have any effect upon the mind of the spouse alleged to be a deserter? [*Herod* v. *Herod*[1] was referred to.] The Queen's Proctor wishes, in view of the information which has now come to light, to be able to pursue certain inquiries; and it is submitted in the circumstances that the normal course should be pursued, and that the summons should be dismissed.

W. L. Monro Davies, for the husband, did not oppose the application. He informed the court that the husband did not know of the wife's adultery until after the petition had been heard.

C. Ingram Poole for the wife. In view of the husband's ignorance of the adultery, and also the fact that the case was one of constructive desertion, it is submitted that the adultery cannot have affected the husband's animus deserendi. The summons was originally issued in view of the wife's pregnancy and as a matter of urgency; but although the child has now been born and cannot be legitimated, it is submitted that the application made in circumstances for which no guidance is provided in the authorities, and upon which the costs incurred have been increased by the wife's residence in Canada, is a proper application which would not, if granted, impede such inquiries as the Queen's Proctor may wish to make before the decree is made absolute.

KARMINSKI J. referred to the facts and continued: It now transpires that before the presentation of this petition, namely, in or about September, 1955, the wife had committed adultery on a number of occasions with a man in Canada, where she was then staying or residing, a fact which was not disclosed either to the court or to her solicitor. I should add at once that, on the evidence at present before me, I am entirely satisfied that before the proceedings were started she was closely questioned by her solicitor as to whether or not she had committed adultery, and informed him that she was innocent of any adultery during the marriage. That answer may well have been true at the time she gave it, but it is equally clear that, in fact, she did commit adultery before the proceedings were started; but failed, as I think deliberately, to disclose it to her solicitor. It is fair to say that she has now filed an affidavit admitting that she did not tell her solicitor, and apologizing for what was at least an omission.

---

[1] [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722.

The matter came for trial before the special commissioner, without any evidence before him that the wife had committed adultery, so that he tried the case on the basis that she had not committed adultery.

The matter now comes before me on a summons, asking leave for the wife to amend her petition, to include in the prayer of that petition a prayer for discretion, and asking leave to file a discretion statement. The summons also asks for a third form of relief—namely, that this court should pronounce a decree absolute. But counsel for the wife did not proceed with that part of his application.

The matter comes before me, admittedly, in a novel form; but novelty is in no way conclusive against an application. There are other matters which have to be considered besides novelty, and those primarily are merits. The summons was served not only on the husband but also on the Queen's Proctor. Counsel for the husband has taken no active step in the debate except, in answer to a question that I asked, to tell me that the husband did not know of the wife's adultery until after the hearing of the petition.

The Queen's Proctor's position, however, is far different—and the Queen's Proctor, not surprisingly, has resisted this summons. Mr. Duncan, for the Queen's Proctor, has pointed out that in the first place the special commissioner (against whom, of course, no sort of error is imputed) has not been able to apply his mind to one of the issues of the case—namely, the husband's knowledge of or indifference to the adultery committed by the wife, because he had no idea that the wife had in fact committed adultery.

There is, of course, the other aspect of the matter, which is at least equally important from the point of view of the public interest—and that is that the Queen's Proctor, on the facts now disclosed to him, is bound to prosecute certain inquiries, a duty not in this case made necessarily easier by the fact that the wife appears to be again residing in Canada. But he is not, I think, handicapped or debarred from prosecuting those inquiries if he so desires, and I understand from Mr. Colin Duncan that the Queen's Proctor may so desire. If and when he satisfies himself as to the relevant facts, it will then become his duty to submit the whole matter to the Attorney-General for directions as to what steps should be taken to bring the matter before the court, or to take no further steps.

I am particularly anxious, in a case of this kind, to do nothing which would in any way impede the Queen's Proctor in carrying out his statutory duties. Indeed, I propose to take particular care that he shall not be so impeded.

It was suggested by Mr. Poole, for the wife, that the question of satisfying a court that the husband had deserted the wife, notwithstanding her adultery, has really been satisfactorily disposed of by the admission made today on behalf of the husband that, at the time of the trial and for the three preceding years, he did not know that the wife had committed adultery. But that is not, I think, the end of the matter because, as I have already pointed out, one of the issues requisite to establishing desertion was not before the special commissioner at all.

It is also suggested that the Queen's Proctor could still make his inquiries if part of the summons were granted—namely, leave to amend and file a discretion statement—and the rest of the summons then adjourned. I do not think that that would be a convenient procedure at all. I believe that the proper and more usual procedure is that the facts having been brought to the attention of the Queen's Proctor—admittedly, as I emphasize, by the petitioner's solicitor—the Queen's Proctor should have an opportunity of pursuing inquiries and taking such steps as he may subsequently be directed to take by the Attorney-General.

In my view this summons must fail. I do not doubt that I have power to deal with it in the form in which it is before me, if I thought it was right and proper. I am not proposing to deal with it on a matter of strict procedural rules. Indeed, I know of no rule which prevents a summons of this kind coming before the court or being acted upon if a court thinks fit; but in the exercise of my judicial discretion I believe the proper course here is to dismiss the summons and to let the matter take such a course as the Queen's Proctor, after investigation and upon direction, sees fit to take. The summons fails and must be dismissed.

Summons dismissed.

Solicitors: *Peter S. Horden, Crewkerne; Batten & Co.; The Treasury Solicitor.*

J. B. G.

C. A.

1957
Feb. 13, 14.

Lord Evershed M.R., Hodson and Ormerod L.JJ.

LEVETT *v.* LEVETT AND SMITH.

Husband and Wife—Divorce—Conflict of jurisdiction—Foreign decree based on residence—Husband domiciled in England—Wife resident in Germany—Wife's petition for divorce in Germany dismissed—Cross-petition for divorce of husband granted by German court—Whether husband's decree valid—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 6, 18 (1).

Conflict of Laws—Jurisdiction—Divorce—Comity.

Husband and Wife — Divorce — Residence — Petition based on wife's residence — Whether husband entitled to cross-petition — " Proceedings by a wife "—Meaning of " proceedings "—Matrimonial Causes Act, 1950, *ss.* 6, 18 (1).

Husband and Wife — Divorce — Discretion — Form of discretion statement—Propriety of preparation by lawyers.

Husband and Wife — Conduct conducing — Divorce proceedings as — Foreign divorce—Adultery before inception of proceedings. Condonation.

At the time of their marriage in 1947 the husband, an Englishman, was domiciled in England and the wife, a German woman, was domiciled in Germany. In 1952 the wife left the husband and went back to Germany and instituted proceedings in Germany for the dissolution of her marriage on the ground of her husband's cruelty. The husband in those proceedings cross-petitioned for the dissolution of the marriage on the ground of his wife's adultery with X. The German court granted a decree of divorce, made absolute on July 20, 1953, to the husband and dismissed the wife's petition. The husband sought a declaration that the German decree of divorce of 1953 had dissolved his marriage; alternatively, that the court would exercise its discretion in his favour and grant to him a divorce on the ground of the wife's adultery with Y. Mr. Commissioner Bush-James dismissed the petition:—

Held, (1) that, assuming that the circumstances in which the wife petitioned for a divorce in Germany were sufficiently similar to the circumstances in which a wife could petition for a divorce by virtue of section 18 (1) (*b*) of the Matrimonial Causes Act, 1950,[1] as to enable a German decree in her favour to be recognized here, that section was enacted to enable a wife to obtain relief which she could not otherwise get, and did not confer a right on a husband respondent to a wife's proceedings to present a cross-petition, and that, accordingly, the husband was not entitled to a declaration that the German decree of divorce was valid.

---

[1] Matrimonial Causes Act, 1950, s. 18: " (1) Without prejudice to any " jurisdiction exercisable by the court " apart from this section, the court " shall by virtue of this section have " jurisdiction to entertain proceedings " by a wife in any of the following " cases, notwithstanding that the husband is not domiciled in England, " that is to say:—. . . (*b*) in the case " of proceedings for divorce or nullity " of marriage, if the wife is resident " in England and has been ordinarily " resident there for a period of three " years immediately preceding the " commencement of the proceedings, " and the husband is not domiciled in " any other part of the United " Kingdom or in the Channel Islands " or the Isle of Man."

Travers v. *Holley* [1953] P. 246; [1953] 2 All E.R. 794 distinguished.

Hollingsworth v. *Hollingsworth* [1952] P. 277; [1952] 2 T.L.R. 202; [1952] 2 All E.R. 284 considered.

(2) That, on the facts, a divorce should be granted to the husband, the court exercising its discretion in his favour.

A discretion statement of a party may be full and frank though it is produced by his lawyers and only signed by him as summarizing the facts which he had to disclose to the court as the relevant facts.

Decision of Mr. Commissioner Bush-James reversed.

Appeal from a decision of Mr. Commissioner Bush-James.

On May 28, 1947, the petitioner, Ronald Albert Levett, an English soldier domiciled in England, married a German girl resident in Germany, at a British garrison church in Germany. They lived together in England and there was one child of the marriage born on July 5, 1949. In 1952 the wife left the husband and went to live in Germany, and on July 24, 1952, she presented a petition to the appropriate court of Munster in Westphalia to have her marriage dissolved on the ground of the husband's cruelty. The husband was granted legal aid by the German authorities and cross-prayed for divorce on the ground of the wife's adultery with the first co-respondent known as "Bernhard." The wife did not proceed with her application and the German court held that the wife had committed adultery with Bernhard and granted a decree to the husband, which was made absolute on July 20, 1953.

On April 3, 1954, the husband presented a petition asking for a declaration that the decree of divorce granted by the court of Munster had validly dissolved his marriage of May 28, 1947; alternatively, he asked that the marriage might be dissolved on the ground of the wife's adultery. The husband alleged adultery with the first co-respondent Bernhard. His petition was subsequently amended and alleged adultery with the second co-respondent George Frederick Smith. The husband was not aware of this adultery when he first presented his petition. He asked the court to exercise its discretion in his favour.

It appeared from the evidence that after the German decree of July 20, 1953, the wife left Germany and came to this country and started to live with the co-respondent Smith. She and Smith tried to marry but were informed that the German

C. A.
1957

LEVETT
v.
LEVETT
AND
SMITH.

decree was invalid. Thereafter they lived together in England as man and wife. A child was born on September 25, 1953, which was admittedly Smith's child.

The husband put in a discretion statement from which it appeared that he began to commit adultery at the end of April, 1954, with a woman with whom he was still living and whom he wished to marry. A child of that union was born on September 3, 1955. His discretion statement is fully set out in the judgment of Hodson L.J.

Mr. Commissioner Bush-James dismissed the petition. He held that the German decree was not entitled to recognition here. He further held that the wife had committed adultery with the co-respondent Smith, but that the husband had by his cross-petition in Germany conduced to or connived at such adultery. He further held that the court's discretion should not be exercised in the husband's favour and the commissioner criticized adversely the husband's discretion statement.

The husband appealed. Neither the wife nor the co-respondent Smith had been represented below nor were they represented on this appeal. The Queen's Proctor was represented before the commissioner and opposed the declaration which the husband sought. He was not represented on the appeal.

N. F. Stogdon for the husband. The commissioner, on the ground that the West German court had no jurisdiction to grant to the husband a decree, dismissed the husband's petition for a declaration that the divorce granted to him by that court was valid. It is submitted that that conclusion was wrong. Section 18 of the Matrimonial Causes Act, 1950, confers jurisdiction to grant a divorce to a wife resident but not domiciled in this country. The question is whether our courts should recognize a similar jurisdiction exercised by the German courts. The German law requires that a wife shall be ordinarily resident in Germany at the time of her petition. It differs from the English jurisdiction in that it does not require that the wife shall have been resident for a period of three years or for any defined period. The second German requirement is that the law of the matrimonial domicile must recognize the German decree as a valid decree of divorce. The court applies English law as to the grounds of divorce. It is submitted that what is important is that the German courts should follow the English requirement as to residence; the exact period of residence is not of importance provided that there is residence. The jurisdiction of the German courts should be recognized: *Travers* v. *Holley*.[2]

The commissioner found that because the husband took part in the German divorce proceedings, and himself applied for and was granted a decree of divorce, he both had condoned and been guilty of conduct conducing to his wife's adultery, and he refused to exercise his discretion in the husband's favour. In so holding he was wrong in principle. [Reference was made to *Blunt* v. *Blunt*.[3]]

If it be held that the German court had jurisdiction to hear the wife's petition, the further question arises whether the husband could succeed on a cross-prayer having regard to the terms of section 18 of the Act of 1950. The question is whether the word "proceedings" in that section is limited to a wife's proceedings or whether it covers the whole proceedings, both a wife's petition and a husband's cross-prayer. The normal use of the word "proceedings" includes the whole of an action, both claim and counterclaim: *Pryor* v. *City Offices Co.*[4] In section 18 "proceedings" includes a cross-prayer by a husband for two reasons: (1) If a wife petitions he has under section 6 a right to cross-petition. Section 6 applies to section 18. (2) If the word "proceedings" is looked at in other sections of the Act it appears that the word covers a cross-prayer as well as a petition: *Hollingsworth* v. *Hollingsworth*.[5] If that is not the correct view, it is submitted that it is against natural justice to allow a wife to petition and to deny to a husband a right to defend himself by a cross-prayer.

LORD EVERSHED M.R. I will ask Hodson L.J. to deliver the first judgment.

HODSON L.J. This is an appeal from an order of Mr. Commissioner Bush-James dated October 1, 1956, by which he dismissed a petition by Ronald Albert Levett for a declaration that his marriage which took place on May 28, 1947, at the Garrison Church, Luneburg, Germany, was validly dissolved by a German court; alternatively, if it were found that the marriage had not been dissolved, the petitioner prayed for a divorce on the ground of the adultery of his wife, notwithstanding his own adultery, in respect of which he asked for the discretion of the court to be exercised in his favour.

---

[2] [1953] P. 246; [1953] 2 All E.R. 794.

[3] [1943] A.C. 517; 59 T.L.R. 315; [1943] 2 All E.R. 76.

[4] (1883) 10 Q.B.D. 504.

[5] [1952] P. 277; [1952] 2 T.L.R. 202; [1952] 2 All E.R. 284.

The first ground upon which the petition was presented, namely, the ground that the marriage had already been dissolved, the relief sought being merely a declaration to that effect, failed, and in my opinion rightly failed. The position was this, that in June of 1953 the petitioner had been granted a decree of divorce against the respondent on the ground of her adultery with a man, said to have the Christian name of "Bernhard," by the Provincial Court at Munster, Westphalia, in Germany. The decree was confirmed in a final form on July 20, 1953. That decree came into existence in the following circumstances: the wife, who was a German girl, had left her husband in England and gone back to her home in Germany; she there instituted proceedings for divorce in the German court against her English husband; the ground which she put forward was cruelty. The German legal procedure provided for the husband to be assisted in his defence, and, although he was not required to go to Germany to deal with the matter, he was put in the position of being able himself not only to deal with the charges of cruelty but also to ask for relief himself on the ground of his wife's adultery. So that the position at the time when the German proceedings took place was that the wife had gone back to her German home where she had been normally resident, and the proceedings were taken against the husband, who was not resident in Germany, but was domiciled in this country, where he had always been domiciled. We have not examined in detail the German record and I think it is unnecessary to consider the circumstances in which the German court took jurisdiction in this case; but it appears that the wife's claim based on cruelty was withdrawn, and the husband obtained relief on the ground of adultery with a man said to be Bernhard. Some question was raised as to the sufficiency of the evidence of adultery, but it is unnecessary to go into that. It appears from the material which is before this court that the wife had before the institution of the German proceedings, and certainly before the German decree was pronounced, committed adultery with Smith, who is named in this petition as a second co-respondent. He was so named by amendment as late as June 28, 1955, when the husband for the first time became aware of that adultery. It is clear from the wife's admission, which was signed by her, and from an admission signed by the co-respondent Smith, that she and Smith had lived together as man and wife since August, 1953, and it is also clear from the statement of the wife that she has a child by Smith born on September 25, 1953, that she must have committed adultery with Smith at about the end of the year 1952.

From that statement of facts it is clear to my mind that the adultery of the wife with Smith was not in any way connived at in its inception or conduced to in its inception by the German proceedings, in so far as the husband was responsible for the German proceedings, in which he took part by way of claim for counter-relief, and, accordingly, before I leave my discussion of the facts, I think it is sufficient to say that, so far as I can see, there is no justification for any finding against this husband of connivance, which would be an absolute bar to divorce, or conduct conducing, which would be a discretionary bar to divorce.

The husband contended before the commissioner and has contended before this court that the German decree ought to be recognized on the ground which was dealt with in this court in *Travers* v. *Holley*,[1] the effect of which is, I think, accurately summarized by Davies J. in the later case of *Dunne* v. *Saban*[2] as follows: " . . . the observations in *Travers* v. *Holley*[3] decide "that this court will recognize the right of foreign courts to "encroach upon the principle of domicile only to the extent to "which this court also does."

The position in this country being that domicile is the foundation of jurisdiction and that there are exceptions to that rule, I must deal with the material exception. Section 18 of the Matrimonial Causes Act, 1950, provides for an additional jurisdiction in proceedings by a wife. I draw attention to the fact that that additional jurisdiction is in terms expressed to be available for a wife. Section 18 (1) (*b*) provides: "in the case of proceedings "for divorce or nullity of marriage, if the wife is resident in "England and has been ordinarily resident there for a period of "three years immediately preceding the commencement of the "proceedings, and the husband is not domiciled in any other part "of the United Kingdom or in the Channel Islands or the Isle "of Man."

Section 18 (1) begins: "Without prejudice to any jurisdiction "exercisable by the court apart from this section, the court shall "by virtue of this section have jurisdiction to entertain pro-"ceedings by a wife in any of the following cases"—and then follows amongst others paragraph (*b*).

---

[1] [1953] P. 246; [1953] 2 All E.R. 794.

[2] [1955] P. 178, 190; [1954] 3 All E.R. 586.

[3] [1953] P. 246.

It has been argued here that, having that provision of the Act of 1950 in mind, following upon the principles enunciated in *Travers* v. *Holley*,[4] this court ought to recognize the German decree as being a valid decree of divorce. I confess I have found great difficulty in understanding how the argument can be addressed to this court on the facts of the present case. The difficulties in the way of applying *Travers* v. *Holley* [4] to this case are numerous. I shall be forgiven if I do not attempt to deal with them all, because one difficulty seems to me to be quite fatal in this case. Even assuming that the wife was resident within the jurisdiction of the German court for a sufficient time to bring the doctrine into force, assuming that she had been deserted by her husband in Germany so that the situation was exactly the same mutatis mutandis as that contemplated by section 18 of the Act of 1950, to my mind section 18 of the Act of 1950 affords no support for the proposition that a husband, because he is respondent to proceedings brought by a wife, ought himself to be enabled to obtain relief on his answer. The courts in this country under section 18 have jurisdiction to entertain proceedings by a wife. It is true that the meaning of the word "proceedings" may vary according to its context, and from one authority to which our attention was drawn, *Pryor* v. *City Offices Co.*,[5] a decision of this court, it is quite clear that the word "proceedings" may cover the whole of the proceedings in question, beginning with the claim and including a counterclaim. It does not follow, to my mind, at all that in the context here, in considering the question of proceedings being entertained by a wife, the word "proceedings" includes anything that may follow in the same suit. The position is, I think, exactly the same as if Parliament had used more homely language and said that the court should have jurisdiction to listen to a request or to hear a claim by a wife for a particular form of relief. That approach to this section makes it quite impossible to hold that a husband coming in, in answer to a wife's claim, could get himself under the umbrella of this section so as to make use of the argument based upon reciprocity.

Mr. Stogdon sought to obtain some support for his argument from a decision of Collingwood J. in *Hollingsworth* v. *Hollingsworth*.[6] That concerned a case where the petitioner had obtained the leave of the judge to present a petition for divorce notwithstanding the fact that three years had not passed, and the respondent filed an answer containing a cross-prayer for relief asking for divorce. It was held there that section 2 of the Matrimonial Causes Act, 1950, related solely to the petition and imposed a restriction on the initiation of a suit for divorce which did not apply to the cross-prayer in an answer, the argument, which was rejected, being that the respondent, the marriage not having subsisted for three years, could not ask for cross-relief unless permission were given, because the intention of the legislature was that no cross-relief should be given to anybody in the position of a petitioner within three years without leave in special circumstances. The judge took a different view and rejected the argument. He relied upon the language of section 6 of the same Act, which provides: "If in any proceedings for "divorce the respondent opposes the relief sought on the ground "of the petitioner's adultery, cruelty or desertion, the court "may give to the respondent the same relief to which he or she "would have been entitled if he or she had presented a petition "seeking such relief."

---

[4] [1953] P. 246.
[5] (1883) 10 Q.B.D. 504.
[6] [1952] P. 277; [1952] 2 T.L.R. 202; [1952] 2 All E.R. 284.

That was a justification for the view which the judge took in dealing with the problem which he had before him, and I express no opinion one way or the other whether the answer which he gave was correct. It was obviously a very sensible and practicable solution of the problem, because he pointed out that, if he did not arrive at that answer, the husband would, in the circumstances, obviously get leave to ask for relief on his answer, because it would be so manifestly unjust if his wife were entitled to ask for relief while he was not. But that, in my opinion, does not touch this case, because the position contemplated by section 6 is the position of a person who seeks for relief in the answer being put in the same position as if he or she had presented a petition seeking the same relief; and, applying that to this case or to a case parallel with this, which was put by Lord Evershed M.R. in the course of the argument, taking the case of a wife deserted in this country by a man who disappeared and went to one of the United States of America, she would be entitled prima facie to rely on section 18 of the Act of 1950, but the husband would not be in a position in his answer to present a petition seeking relief, namely, divorce, unless he was domiciled in this country. To my mind, no assistance can be gained from section 6, in the sense that it can be said that section 6 of the Act of 1950 governs the operation or the effect of section 18. So much for the prayer for a declaration, which in my view fails.

On the other part of the case, the commissioner having found adultery with the co-respondent Smith clearly proved, refused to exercise his discretion in favour of the petitioner. This court would not in the ordinary way interfere with the exercise of the discretion of the commissioner, but I think this is an exceptional case and one in which we should interfere, because it is quite plain from the judgment, first of all, that he came to the conclusion that no exercise of discretion was called for at all, because he held that by his participation in the German divorce proceedings the husband had connived at his wife's adultery with Smith. The husband did nothing of the kind. On the facts proved, he did not connive. So the absolute bar goes. Moreover, the commissioner thought that, if he were wrong in his finding of connivance, the husband, by his conduct in those German proceedings, conduced to the adultery of the wife. For the reasons which I gave earlier in this judgment, that ground also is plainly wrong. This man in no way conduced to the inception, which I think for this purpose is the material moment to consider, of his wife's adultery with Smith.

In my judgment the commissioner was not entitled to criticize the form of the discretion statement or the way in which it was adopted by the husband, in the way in which he did. It reads as follows: "The court will be asked to exercise its discretion to "grant me a decree of divorce notwithstanding my adultery as set "out below. 2. In September, 1953"—a named person—"came "to live at my house. She occupied a separate room from me "and no intimacy took place between us until the end of April, "1954. Since that time she and I have lived together as man "and wife at Southdown, Alfriston, Sussex, and have frequently "committed adultery together. 3. On September 3, 1955, the "said" woman "gave birth to a child . . . of which I am the "father. 4." This woman "and I intend to marry if the court "sees fit to grant me a decree of divorce. 5. Save as set out "above I have never committed adultery."

That document, as appears I think from the form in which it is made, was a document of a kind which would not be produced by the petitioner himself, but by his lawyers, signed by him as summarizing the facts which he had to disclose to the court as the relevant facts. I see no reason to criticize that document. Assuming, in the husband's favour, that it is true—and there is no reason to doubt it—he disclosed the relevant facts and added to the relevant facts another matter which was material, namely, that he hoped and intended to marry this woman with whom he was living if he were free—which is always a matter to be taken into consideration. But the commissioner was thoroughly dissatisfied with this statement. He said: "This petitioner is "legally aided, and this inordinate delay cannot be attributed to "the petitioner's financial position. Again, had the petition "simply asked for a decree on the ground of adultery, the case "would have almost certainly been over before the child was "born. In saying this, I do not want it to be thought that I am "overlooking the substance of the discretion statement, which "to say the least, I find disturbing. The petitioner was entitled "to anticipate a more speedy trial than he received, but having "been asked, as I must assume he was, whether he had com-"mitted adultery himself, and having answered no and sworn a "petition to that effect, he immediately entered into an adul-"terous relationship. In my view, it was a very wrong course "of action to take, and one which does not commend itself to the "court."

So far, I have no quarrel with that statement as to the husband's adultery having taken place almost immediately after he had come to the court and asked for relief; and no doubt at one time that might have been considered a strong ground for refusing relief, at any rate, unless some very good explanation was given of why the events happened in the way they did. But the judgment goes on as follows: "Further, a discretion state-"ment should contain 'the facts which it is material for the "'court to know.' To take one example, I should have thought "it material to state, which it does not, whether this association "was envisaged or planned before or after the presentation of "the petition. No doubt the petitioner did not draft his own "statement, but it is hardly full and frank. I asked him "whether it contained the whole truth, and he was content to "answer 'Yes.'"

If the commissioner had pursued the question he put to the husband on this topic, as he would have been well entitled to do, he might have found out how it was that the husband came to have this woman living in his house, and how it came about that the relationship developed in the way in which it did; but he did not take that course, and to my mind there was no justification for saying that the discretion statement was not full and frank. In my judgment, so far as one can tell, it was full and frank, and the fact that matters were not further explored, which might have been explored, does not in any way justify this court in holding that there was any lack of frankness in this matter.

The main ground, however, upon which I think this court ought to interfere is the ground that the commissioner took, undoubtedly, in my view, a wrong course in applying his mind to the question of conduct conducive and connivance, which really did not arise in this case; and when those matters are out of the way, having regard particularly to the circumstances of the case, that the husband is apparently in a permanent liaison with a woman whom he desires to marry and by whom he has had a child, this court ought to exercise its discretion and pronounce a decree in his favour.

Ormerod L.J. I agree. As was correctly stated by the commissioner, applying the test laid down in *Travers* v. *Holley*,[7] the question he had to consider was whether the circumstances under which the wife could petition for divorce in Germany were sufficiently similar to the circumstances under which a wife in a like case could petition for divorce in this country by virtue of section 18 (1) (*b*) of the Matrimonial Causes Act, 1950. The commissioner appears in his judgment to have considered this purely on the basis of whether the conditions of residence in Germany were similar to the condition of residence imposed by the subsection, that is, ordinary residence in this country for a period of three years immediately preceding the presentation of the petition. In Germany, according to the evidence given by an expert in German law, the test is that the petitioner should be ordinarily resident. There is no period of time laid down, and it is a question, in the whole of the circumstances in each case, for the court to decide whether there is jurisdiction on the ground of the petitioner being ordinarily resident. That is the only matter which the commissioner considered. He came to the conclusion that there was not sufficient similarity in jurisdiction between this country and Germany to warrant a declaration in the form asked for. There was, however, a further factor to be considered. The fact was that, although in Germany the wife presented a petition, she did not proceed with it. But the husband was allowed to enter a cross-petition and the decree was granted on the cross-petition of the husband. I think that is a matter which is of considerable importance in considering this part of the case. Mr. Stogdon argued that the jurisdiction is similar here, because, on a proper construction of section 18, a husband under these circumstances would be entitled to enter a cross-petition; and the argument, as I understand it, that as a wife would be entitled to present a petition after being ordinarily resident in this country for a period of three years such presentation would be "proceedings" within section 6 of the Act, and the presentation of a cross-petition by the husband merely a step in those proceedings, and therefore the husband must be entitled to present his petition and have the matter heard. Mr. Stogdon based his argument on the combined result of section 6 and section 18. Section 6 of the Act provides that: "If in any "proceedings for divorce the respondent opposes the relief sought "on the ground of the petitioner's adultery, cruelty or desertion, "the court may give to the respondent the same relief to which "he or she would have been entitled if he or she had presented a "petition seeking such relief." In other words, under section 6 undoubtedly a respondent may present a cross-petition and may obtain relief under proper circumstances. The argument is that if it is allowed by section 6 there is no reason why there should be any limitation of the right in the case of a petition under section 18, and therefore, if the wife may present a petition, the husband must equally be able to cross-petition. I cannot agree with this contention. As I see it section 18 was enacted for the purpose of enabling a deserted wife to obtain a relief which she would not otherwise get because she had not the necessary domicile in this country, but does not go, so far as to extend that right to the husband so as to enable him to present a cross-petition. In my view that would be taking a wider view of the section than the words of the section warrant. Section 6 deals not only with petitions presented by wives but with petitions presented by either spouse, and, in my view, it would be wrong to say that because of section 6, section 18 gives to a husband the right to present a cross-petition. For these reasons I am satisfied that the declaration should not stand.

---

[7] [1953] P. 246.

With regard to the other question, I have nothing to add. I agree that there should be a decree here for the reasons already given.

LORD EVERSHED M.R. I am also of the same opinion and think that, although the petitioner is not entitled to the declaration which he has sought, he is entitled to a decree for dissolution of the marriage. Although, as regards the second point, we are differing from the conclusion of the commissioner and, upon the first point, have reached a similar conclusion by a somewhat different route, I do not think it would serve any useful purpose for me to add to the reasons which have fallen from my brethren,

C. A.
1957
LEVETT v. LEVETT AND SMITH.

and with which I find myself in full concurrence. I therefore say no more, save this, that in so leaving it I hope I shall not be thought to indicate any disrespect to the commissioner.

The appeal is allowed accordingly to the extent that a decree will be granted, I take it, as prayed by the petition.

Appeal allowed.
Decree nisi granted.

Solicitors: *Church, Adams, Tatham & Co. for Barwell & Blakiston, Seaford.*

B. A. B.

C. A.
1957
Mar. 1.
Hodson and Ormerod L.JJ., Hallett J.

STERNE v. STERNE.

Husband and Wife—Alimony pendente lite—Assessment of amount—National assistance by wife—Court entitled to take assistance benefit into consideration—No order for alimony—National Assistance Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *ss.* 42, 43—*Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 19.
National Assistance.

On November 16, 1956, a wife presented a petition for the dissolution of her marriage. The husband earned about £700 a year gross and he had a £1 0s. 6d. weekly disability pension. He had no capital. The wife was unemployed and in receipt of £2 5s. 6d. a week national assistance benefit. Wallington J. dismissed the wife's application for alimony pendente lite, holding that the national assistance benefit received by the wife should be taken into account in deciding whether the husband should be ordered to pay alimony pendente lite:—

Held, that the court in the exercise of its discretion was entitled to take into account the fact that the wife was in receipt of national assistance benefit and to hold that this was not a case in which an order for alimony pendente lite should be made.

National Assistance Board v. *Prisk* [1954] 1 W.L.R. 443; [1954] 1 All E.R. 400; *National Assistance Board* v. *Parkes* [1955] 1 Q.B. 486; [1955] 1 All E.R. 700; affd. [1955] 2 Q.B. 506; [1955] 3 All E.R. 1 and *Welton* v. *Welton* [1927] P. 162; 43 T.L.R. 174 considered.

Decision of Wallington J. affirmed.

APPEAL from Wallington J.

William Allan Kaye Sterne and Daphne Ivy Maud Sterne were married on July 4, 1953, and they parted in 1955. On November 16, 1956, the wife presented a petition for divorce.

By this application she sought alimony pendente lite. The wife was unemployed and her sole income was £2 5s. 6d. a week, which she received as national assistance. The facts are more fully stated in Hodson L.J.'s judgment. Wallington J. dismissed the wife's application.

The wife appealed.

Guy Willett for the wife. The wife has no money of her own and she is entitled to alimony pendente lite. Wallington J. erred in law in holding that the weekly sum which she received as national assistance should be taken into account when considering her application for alimony. In *Welton* v. *Welton*[1] Sargant L.J. said that the question in considering a wife's claim to alimony was whether she had sufficient independent means of her own. Here clearly she has no such means. The weekly payments of £2 5s. 6d. have been made to the wife under the National Assistance Act, 1948. These payments may be recovered under section 43 (1) from the husband. The Act has not affected the husband's liability to maintain the wife: *National Assistance Board* v. *Parkes*.[2] Public assistance should not be treated as satisfying the husband's liability. The wife only gets £2 5s. 6d. national assistance; if the husband were ordered to pay alimony, having regard to his income, the sum awarded would probably be £3 a week. The wife as a wife is entitled to a personal allowance from her husband for her support. National assistance is not given to a wife as such. [Reference was made to *Dewe* v. *Dewe*.[3]] A husband is not entitled in reliance on national assistance to get out of his obligations to his wife. The jurisdiction to grant alimony pendente lite is wider than the jurisdiction of the magistrates to order a husband to pay the claim of the National Assistance Board for repayment under the Act. The jurisdiction of the court to interfere with the way in which a judge has exercised his discretion in this matter was considered in *J.* v. *J.*[4] Further, the payments made by the National Assistance Board do not last until the wife's petition has been heard. The husband does not perform his duty to his wife by relying on the National Assistance Board providing for her.

Joseph Jackson for the husband. The question here is whether the wife has sufficient independent means of support pending suit: *Coombs* v. *Coombs*.[5] This is not an application for maintenance. Alimony is payable at a lesser level. [Reference was made to *National Assistance Board* v. *Parkes*,[6] *Waller* v. *Waller*[7] and *Welton* v. *Welton*.[8]] The court will take into consideration in assessing alimony the fact that the wife is in receipt of a voluntary allowance from a third person: *J.* v. *J.*[9] The position is the same here. The wife is getting money from another source. The test is not where the wife's income comes from but what it is.

---

[1] [1927] P. 162, 164, 179; 43 T.L.R. 174.

[2] [1955] 1 Q.B. 486; [1955] 1 All E.R. 700; [1955] 2 Q.B. 506; [1955] 3 All E.R. 1.

[3] [1928] P. 113; 44 T.L.R. 274.

[4] [1953] P. 186; [1952] 2 All E.R. 1129.

Guy Willett in reply. A claim for alimony should not be decided on the basis of what a wife has received in the past. This wife may not be able to get national assistance in the future. The fact that she has received it should not prejudice her future rights against her husband. The object of an order for alimony pending suit is to prevent a wife becoming a charge on public funds.

HODSON L.J. This is an appeal by leave of this court from an order of Wallington J. dated February 5, 1957. The circumstances, shortly, were that on November 16, 1956, the petitioner, the present appellant, presented a petition for dissolution of her marriage from her husband, the respondent, on the ground of his adultery. She was married to him on July 4, 1953, and they parted in February, 1955. Her present claim is for alimony pendente lite. Her husband is a clerk in London and he earns about £700 a year gross, and in addition to that he has a disability pension, which would not be subject to tax, of £1 0s. 6d. a week, and he has virtually no capital above £100.

The financial position of the wife, according to her affidavit sworn in January, 1957, which was the only material before the registrar who first considered the matter, and the only material before the judge, is that she is at present unemployed and in receipt of national assistance in the sum of £2 5s. 6d. a week, which is her only income. She is living with her sister at an address in Helston, Cornwall, to whom she pays £1 10s. 0d. a week towards the cost of her food and lodging; she formerly paid her sister £2 a week. Up to October 8, 1956, she was in gainful employment, said to be seasonal, at a petrol station and receiving a weekly wage of £4 4s. 9d. Just before she and her husband parted in February, 1955, she received from him £86, representing the amount due to her on the sale of some shares which stood in her name, and in addition she received about £15 from him over the following six months.

---

[5] (1866) L.R. 1 P. & M. 218.

[6] [1955] 1 Q.B. 486.

[7] [1956] P. 300; [1956] 2 All E.R. 234.

[8] [1927] P. 162.

[9] [1953] P. 186; [1952] 2 All E.R. 1129.

There is nothing in either of the affidavits as to the circumstances in which they parted, or whether or not the wife deserted her husband. All that does appear is that she made no claim on him for support until these proceedings were instituted and that she did earn money in what she described as a seasonal employment until October 8, 1956.

The complaint of the wife is stated in the first ground of appeal: "That the learned judge erred in holding that the receipt "by the petitioner of national assistance benefit was income "proper to be taken into account when deciding whether, and in "what amount, the respondent should be ordered to pay alimony "pendente lite." That is substantially the ground of appeal because Mr. Willett, for the wife, was not able to argue that if the matter had been a matter of quantum only he could have asked this court to interfere, because matters of quantum are naturally left to be decided in almost every case by the first tribunal, which has to exercise discretion in cases where quantum is involved. The right to alimony pendente lite is discretionary.

The present position is governed by section 19 of the Matrimonial Causes Act, 1950, subsection (1) of which reads: "On "any petition for divorce or nullity of marriage, the court may "make such interim orders for the payment of alimony to the "wife as the court thinks just." There is no question but that in this case the wife is a competent suitor and is entitled to apply for alimony pendente lite, although the court, in the exercise of its discretion, will not be guided only by the income disclosed by the respective parties. In this case there is nothing in the conduct of the parties which, so far as I know, has been taken into account, and, indeed, the evidence on that matter is almost non-existent.

I return, therefore, to the only point which emerges in this case, whether, as a matter of law, the judge was wrong in taking into account the receipt of public assistance by the wife in reaching the result which he did. In my judgment there is no ground for saying that the judge erred in that respect. The position is now regulated by the National Assistance Act, 1948. By section 42: "For the purposes of this Act (1) (*a*) a man shall be "liable to maintain his wife and his children." Section 43 (1) provides: "Where assistance is given or applied for by reference "to the requirements of any person (in this section referred to "as a person assisted), the Board or the local authority concerned may make a complaint to the court against any other "person who for the purposes of this Act is liable to maintain "the person assisted." Subsection (2) provides: "On a complaint under this section the court shall have regard to all the "circumstances and in particular to the resources of the defendant, and may order the defendant to pay such sum, weekly "or otherwise, as the court may consider appropriate."

That matter has been considered by the Divisional Court on a number of occasions; I refer to the judgment of Lord Goddard C.J. in *Stopher* v. *National Assistance Board* and *National Assistance Board* v. *Parkes*,[1] to which my brother Ormerod was a party. It was made abundantly clear in that case that the position regarding the husband's liability to maintain his wife, as it existed before the passing of the National Assistance Act, 1948, had not been changed. Lord Goddard C.J. repeated what had previously been said in *National Assistance Board* v. *Prisk*.[2] He made it plain that the National Assistance Act, 1948, had not altered the liability of a husband to support his wife as it was previously held to exist. In dealing with desertion, Lord Goddard C.J. said[3]: "The law is different where the wife has "deserted her husband. *Jones* v. *Newtown and Llanidloes* "*Guardians*[4] laid down that the right to maintenance of a wife "who has deserted her husband is only suspended, and if she "returns to her husband then she has a right to be maintained; "but as long as she is in desertion the husband is under no "obligation to support her. In *National Assistance Board* v. "*Wilkinson*[5] the wife was in desertion. The husband provided "a perfectly proper and adequate home for the wife, but she "wanted to live elsewhere and would not go and live with him. "It was decided that in such circumstances the husband was not "bound to support the wife, and it decided nothing else."

I have referred to that matter not because it directly affects this case but because it may have an effect on what may happen hereafter.

The authorities of the Divisional Court to which I have referred were expressly confirmed by this court which heard the appeal in *National Assistance Board* v. *Parkes*.[6] The decision in *National Assistance Board* v. *Prisk*[7] was wholly supported, as also was the judgment of Lord Goddard C.J. in *National Assistance Board* v. *Parkes*.[8]

---

[1] [1955] 1 Q.B. 486; [1955] 1 All E.R. 700; affd. [1955] 2 Q.B. 506; [1955] 3 All E.R. 1.

[2] [1954] 1 W.L.R. 443; [1954] 1 All E.R. 400.

[3] [1954] 1 W.L.R. 443, 445.

[4] [1920] 3 K.B. 381; 36 T.L.R. 758.

[5] [1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255.

Therefore the position, as I understand it, is this: it may be doubtful whether this wife is in a position in which her right to be supported by her husband persists at common law, so that it may be doubtful whether the National Assistance Board will be able to recover from the husband any money which may be paid to her from time to time. But, however that may be, the position at the present time to which the court has regard is that the wife is in receipt of these payments. If she is in desertion, no doubt the National Assistance Board will not be able to recover those sums from the husband. If she is not in desertion, no doubt the National Assistance Board will be able to recover those sums from the husband. So far as the present position is concerned, it seems to me impossible to say that the court, in the exercise of its discretion, is not entitled to look at the facts as they are now. Taking those facts, the wife is in receipt of an income which the husband may in the future be compelled to reimburse because it comes from the National Assistance Board. But taking the position as it is, the court in the exercise of its discretion is entitled to say that there is not here a case in which an order should be made in favour of the wife.

In my judgment, therefore, this appeal should be dismissed.

ORMEROD L.J. I agree. Mr. Willett in the course of his argument relied on a sentence in the judgment of Sargant L.J. in *Welton* v. *Welton*,[9] where he said that the question was whether the wife had sufficient independent means to support her. If she had, then there was no ground for an order for alimony pending suit. If, on the other hand, she had not sufficient means, then there was ground for an order. Mr. Willett laid emphasis on the word "independent" as meaning something in the nature of permanent private means of the wife coming from some entirely independent source. I do not think that the word "independent" was intended to have such a meaning. As a matter of fact, in an earlier passage in his judgment Sargant L.J. talked of sufficient means of support, without using the word "independent" at all. I think that word can

---

[6] [1955] 2 Q.B. 506.

[7] [1954] 1 W.L.R. 443.

[8] [1955] 1 Q.B. 486.

[9] [1927] P. 162, 179; 43 T.L.R. 174.

C. A.
1957

STERNE
v.
STERNE.

Ormerod L.J.

mean nothing more than means independent of those provided by the husband.

Applying that test in this case, the judge, on appeal from the registrar, came to the conclusion that the wife was receiving from the Public Assistance Board the sum of £2 5s. 6d. a week, and she had those means of support which were independent of her husband. It may very well be that the circumstances are such, as my brother has said, that any sums paid to her by the National Assistance Board may be recovered by virtue of section 43 of the National Assistance Act, 1948, but at the moment those payments are being made for her subsistence. She has, therefore, those means of subsistence, and I cannot find that there was any error in principle on the part of the judge in exercising his discretion as he did.

I agree that this appeal must be dismissed.

HALLETT J. I agree.

Appeal dismissed.

Solicitors: *Balderston, Warren & Co. for Ratcliffe, Son & Henderson, Helston, Cornwall; Craigen, Wilders & Sorrell.*

B. A. B.

C. A.

1957
March 21.

Denning L.J.
and
Karminski J.

HULBERT *v.* HULBERT.

Husband and Wife—Practice—Interrogatories—Cruelty—Whether permissible—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940 (*L.*27)), *r.* 23.
Practice and Procedure—Interrogatories—Matrimonial causes.

In matrimonial cases where cruelty or desertion is alleged, interrogatories are permissible where they are necessary either for fairly disposing of the case or for the saving of costs.

Rule 23 of the Matrimonial Causes Rules, 1950,[1] is quite general, and must be read in conjunction with R.S.C., Ord. 31, rr. (1) and (2).

---

[1] Matrimonial Causes Rules, 1950, r. 23 (1): "Any party to a matrimonial cause may with leave deliver "interrogatories in writing for the "examination of an opposite party."
R.S.C., Ord. 31, r. (1): "In any "cause or matter the plaintiff or "defendant by leave of the court or "a judge, may deliver interrogatories "in writing for the examination of "the opposite parties, or any one or "more of such parties . . ."

Harvey v. *Lovekin* (1884) 10 P.D. 122; 1 T.L.R. 136 and *Redfern* v. *Redfern* [1891] P. 139; 7 T.L.R. 157 applied.

Decision of Willmer J. affirmed.

APPEAL from Willmer J. (in chambers).

On September 9, 1955, the wife, Sophia Helena Hulbert, filed a petition for divorce on the ground of cruelty, alleging assaults and violence, to which the husband, Royston Stanford Hulbert, pleaded not guilty of cruelty; alternatively, condonation. In October, 1956, the wife filed a supplemental petition in which she alleged that the husband had sent Christmas cards to mutual friends in which he defamed her with the object and effect of embarrassing and distressing her; that when he was visiting Holland he had spoken to women and made similar defamatory statements about her; and that in addition he had visited the Law Society in London and had informed the Legal Aid department that the wife had provided the National Assistance Board with false information.

To these additional charges of cruelty the husband simply pleaded "Not guilty of the cruelty as therein alleged."

The wife having obtained from Registrar Townley Millers leave to administer interrogatories, in respect of the additional allegations of cruelty, the husband appealed to the judge in chambers. Willmer J. upheld the registrar's decision, and the husband now further appealed.

The question for decision was whether interrogatories were permissible in a divorce suit for cruelty.

Joseph Jackson for the husband. Willmer J., in approving the order of the registrar, said that in the course of his 11 years on the bench he had never had such a case to decide, but he saw no reason why interrogatories should not be allowed as they were in libel actions. It is submitted, however, that the practice in the Divorce Division differs from that in the Queen's Bench Division. The petitioner here is trying to get the respondent to confess and avoid. In the reported cases interrogatories are only allowed in nullity cases. Interrogatories as to adultery are barred by statute and it is submitted that cruelty should be associated with adultery. The petitioner is trying to establish her case out of the mouth of the respondent husband, and that should not be permitted. No such interrogatories have ever been allowed in the Divorce Division, which in this respect follows the practice of the old ecclesiastical courts. [In addition to the cases mentioned in the judgments reference was made to *Thompson* v. *Thompson*[2]; *Euston* v. *Smith*[3]; *Bass* v. *Bass*[4]; *Ramsey* v. *Ramsey*[5]; *Attorney-General* v. *Gaskill.*[6]]

Desmond Ackner for the wife. It was submitted for the husband that there is some sacrosanct provision in divorce practice which forbids the serving of interrogatories. But it was admitted that there appeared to be no reported case which supported that contention. That is not surprising. If there is no special rule, outside adultery, what is there to report? It is impossible to believe that this is the first attempt to interrogate in a case of cruelty. The absence of reported cases is no doubt due to the fact that it is seldom necessary to interrogate. The serving of interrogatories will not interfere with the onus of proof. If the respondent answers "Yes," the petitioner will still have to establish that the defamation amounts to cruelty and that her health has been affected thereby. The court will still have to be satisfied and the petitioner will have to give evidence. Where there are perfectly clear rules it is unnecessary to go back to the distant past—the time of the ecclesiastical courts.

DENNING L.J., having stated the facts as set out above, continued: In the first interrogatory the wife asks the husband to look at one of the Christmas cards and to answer the question: "Did you not send this card to Mr. and Mrs. Elbo?" Then in the next two interrogatories (concerning cases where she has not got the Christmas cards) she asks: "Did you not state in "writing on a Christmas card" such-and-such? In the fourth and fifth interrogatories she asks about the conversations with the women in Holland: "Did you not tell them . . ." so-and-so, setting out the defamatory statements? Finally, in the sixth interrogatory, she asks: "Did you not tell the Law Society that "I had given false information?" The first five interrogatories are put for the purpose of saving the costs of calling the witnesses from different parts of this country and from Holland; and the last interrogatory, about the Law Society, is put because it is said that there may be a statutory prohibition preventing a witness from the Law Society giving that evidence. On this account it is said these interrogatories are necessary for fairly disposing of the case and for saving costs.

---

[2] [1957] P. 19; [1957] 1 All E.R. 161, 169.

[3] (1884) 9 P.D. 57.

[4] [1915] P. 17.

[5] [1956] 1 W.L.R. 542; [1956] 2 All E.R. 165.

[6] (1882) 20 Ch.D. 519, 530.

Mr. Jackson has urged before us that in the Divorce Division interrogatories are never allowed so as to enable a petitioner to make out a case of cruelty. He says that the petitioner is not permitted to prove her case out of the mouth of her husband; that no such interrogatories have ever been allowed, and that in this respect the Divorce Division follows the practice of the old ecclesiastical courts.

I find myself unable to accede to that argument. It is true that interrogatories are very rarely allowed in the Divorce Division, but that is because in the great majority of cases they are not necessary for fairly disposing of the matter or for saving costs; but in a proper case I have no doubt that they are permissible. I cannot agree with what Mr. Jackson says about the ecclesiastical courts. Those courts habitually allowed interrogatories, in one shape or another, when they would never have been allowed in the common law courts. In *Swift* v. *Swift*[1] Sir John Nicholl pointed out that, although in the ordinary common law courts no party was bound to furnish evidence against himself, it was otherwise in the ecclesiastical courts and in the courts of equity, because a party was bound to answer there as to the facts. Those courts recognized, of course, that a party was not bound to incriminate himself. That is a privilege which is available in all the courts to this day, but it is a privilege which has to be taken in the answer. It is not a ground for disallowing the interrogatory.

After the Divorce Court was set up it, too, allowed interrogatories to be administered: see *Harvey* v. *Lovekin*[2] and *Redfern* v. *Redfern*.[3] The only exception is that in an adultery case a petitioner is not allowed to prove adultery by interrogatories. That exception arises from the fact that under the statute (originally section 3 of the Evidence Act, 1869, and now section 32 of the Matrimonial Causes Act, 1950) there is a fetter on the asking of questions which go to adultery. The statute puts adultery on a special footing. There is no such fetter on questions as to cruelty and desertion. Lindley L.J. no doubt had that in mind in *Redfern* v. *Redfern*[4] when he said that "discovery as to these . . . matters is permissible." By "discovery" I take it he is meaning, not only discovery of documents, but also discovery by way of interrogatories.

---

[1] (1832) 4 Hag.Ecc. 139, 154.

[2] (1884) 10 P.D. 122; 1 T.L.R. 136.

[3] [1891] P. 139; 7 T.L.R. 157.

[4] [1891] P. 139, 146.

In these circumstances I think that, in cases alleging cruelty or desertion, interrogatories are permissible where they are necessary either for fairly disposing of the case, or for saving costs. Rule 23 of the Matrimonial Causes Rules, 1950, is quite general. It must be read with R.S.C., Ord. 31, rr. (1) and (2). I agree that in a divorce case it is rare that interrogatories are necessary for fairly disposing of the case or for saving costs; but in this case the registrar and the judge were so satisfied, and I agree with them. I would dismiss the appeal.

KARMINSKI J. I am of the same opinion. It may well be that discovery by way of interrogatories in matrimonial suits is rare. The paucity of reported cases may indicate its rarity or it may equally well indicate that no serious problems of general principle have arisen. It is likely that the nature of matrimonial proceedings has made many practitioners think in the majority of cases that interrogatories are unlikely to be profitable. That, of course, does not affect the question of principle.

So far as the practice in the ecclesiastical courts before 1857 is concerned, I can find very little assistance, because the nature of the taking of evidence in those courts was such, and of so different a nature from what is now practised, that the meaning of interrogatories under that practice was quite different from their present meaning. But at any rate from 1873 onwards I think it is clear from the few cases that have been reported that the courts in matrimonial suits have allowed interrogatories in proper cases, provided always that they were not directed to the proof of adultery—an exception which, as my Lord has pointed out, is derived from statutory protection. But in 1890, at any rate, when *Redfern* v. *Redfern*[5] was decided in this court, Bowen L.J. said that he did not "doubt for a "moment that the court has the power of allowing interrogatories "and discovery both in ordinary cases, and even in divorce suits, "upon issues which are not directed to the proof of adultery."

In 1907, in *E.* v. *E.*,[6] questions arose as to an interrogatory dealing with the alleged communication of a venereal disease in a case where cruelty and adultery were both alleged by the wife. Bargrave Deane J. is reported to have said that interrogatories at that time were "somewhat unusual."

The first rule in the divorce jurisdiction on interrogatories appears to have been introduced only in 1924, and that rule is now embodied as rule 23 in the Matrimonial Causes Rules, 1950. The rule is of fairly wide ambit, and has, I think, to be read in conjunction with R.S.C., Ord. 31, r. (2). But I have no doubt whatsoever that in a proper case interrogatories can be allowed in matrimonial suits to deal (as in this case) with the proof of an allegation of cruelty.

---

[5] [1891] P. 139, 149.

[6] (1907) 24 T.L.R. 78.

My Lord has dealt with the special nature of the matters which form the subject of the interrogatories and which relate only to the supplemental petition in this case. Once the principle is established, the rest, as I understand it, is a matter of discretion for the judge. I agree that this appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors: *Pollard, Stallabrass & George Martin; Herbert Oppenheimer, Nathan & Vandyk.*

A. W. G.

SCHWARZ & CO. (GRAIN) LTD. *v.* ST. ELEFTERIO EX ARION (OWNERS).

1957
Apr. 16, 17.
Willmer J.

THE ST. ELEFTERIO.

Admiralty — Jurisdiction — Carriage of goods—" Claim arising out of " any agreement"—Whether covering claim in tort so arising—Bills of lading antedated — Claim by transferee against ship — Administration of Justice Act, 1956 (4 *&* 5 *Eliz.* 2, *c.* 46), *s.* 1 (1) (*h*).

Admiralty—Jurisdiction—Action in rem—Whether necessary to prove liability in personam at outset — Motion to set aside writ and warrant of arrest—Administration of Justice Act, 1956, *s.* 3 (4).

The plaintiffs bought a cargo of cattle cake, shipped on board the defendants' vessel *St. Elefterio,* from sellers who were the charterers of the vessel and the shippers of the cargo. The bills of lading were endorsed in blank by the shippers and presented to the plaintiffs. Subsequently the plaintiffs resold the cargo and presented the bills of lading to their purchasers, who claimed the right to reject the goods on the ground that the bills of lading were antedated. The plaintiffs commenced an action in rem against the owners of the *St. Elefterio* and arrested that vessel.

1957

THE ST. ELEFTERIO.

The defendants moved for an order that the writ of summons and warrant for arrest be set aside on the ground that the court had no jurisdiction to entertain an action in rem against the defendants' vessel:—

Held, (1) that the words of section 1 (1) (*h*) of the Administration of Justice Act, 1956,[1] were wide enough to cover claims arising out of any agreement relating to the carriage of goods in a ship, whether such claim was based in contract or in tort.

(2) That the words "who would be liable on the claim in an "action in personam," in section 3 (4) of the Act of 1956,[1] did not restrict the right to proceed in rem by requiring the plaintiff to prove at the outset of proceedings a cause of action sustainable in law.

Per curiam. The purpose of section 3 (4) is to confer, for the first time in England, the right to arrest either the ship in respect of which the cause of action is alleged to have arisen or any other ship in the same ownership.

MOTION.

The plaintiffs commenced an action against the defendants for damages arising out of bills of lading relating to the carriage of goods in the defendants' steamship, and arrested the defendants' vessel. The defendants moved for an order that the writ of summons and warrant of arrest of their vessel be set aside with costs, on the grounds that the court had no jurisdiction in respect of the writ of summons under sections 1 and/or 3 of the Administration of Justice Act, 1956, and that the plaintiffs were not entitled to institute proceedings in rem against their vessel.

Ashton Roskill Q.C., Michael Kerr and *M. J. Mustill* for the defendants. The plaintiffs have no right to proceed in rem. Section 1 of the Administration of Justice Act, 1956, is not framed in such wide terms as the corresponding section of the Judicature Act, 1925. The preamble of the Act of 1956 states that the Act is an amending Act. Section 22 (1) (*a*) (xii) of the Supreme Court of Judicature (Consolidation) Act, 1925, refers to an action in tort in respect of goods carried in a ship. Section 1 of the Act of 1956 makes no mention of an action in tort and to such extent the jurisdiction in rem is amended and restricted by the Act of 1956.

---

[1] Administration of Justice Act, 1956, s. 1: "(1) The Admiralty jurisdiction of the High Court shall be "as follows, that is to say, jurisdiction to hear and determine any "of the following questions or claims ". . . (*h*) any claim arising out of "any agreement relating to the "carriage of goods in a ship or to "the use or hire of a ship."

S. 3: "(4) In the case of any "such claim as is mentioned in "paragraphs (*d*) to (*r*) of s. 1 (1) "of this Act, being a claim arising "in connexion with a ship, where "the person who would be liable on "the claim in an action in personam "was, when the cause of action arose, "the owner or charterer of, or in "possession or in control of, the ship, "the Admiralty jurisdiction of the "High Court . . . may (whether the "claim gives rise to a maritime lien "on the ship or not) be invoked by "an action in rem against—(*a*) that "ship, if at the time when the action "is brought it is beneficially owned "as respects all the shares therein "by that person; or (*b*) any other "ship which, at the time when the "action is brought, is beneficially "owned as aforesaid."

Section 3 (4) of the Act of 1956 is a further bar to the plaintiffs proceeding in rem. By that section the right to proceed in rem is only exercisable if there exists a liability in personam. There can be no jurisdiction in rem exercisable against the *St. Elefterio*, since for various reasons her owners cannot be liable. There is authority in Scots law for the proposition that the owners of a vessel cannot be liable to an indorsee for the damage sustained by reason of the master of the vessel signing incorrect bills of lading: *Walter Grieve, Son & Co.* v. *König & Co.*[2] The bills of lading were signed as presented by the shippers and the indorsees cannot be in a better position by virtue of the Bills of Lading Act, 1855, than the original shippers. No cause of action is sustainable at common law for issuing an incorrect bill of lading: *Heskell* v. *Continental Express Ltd.*,[3] *per* Devlin J. The plaintiffs had already sold the goods when the writ in the action was issued and therefore cannot establish a title to sue: *Smurthwaite* v. *Wilkins*.[4] The shippers were also the charterers of the vessel and therefore the bills of lading were mere receipts: Scrutton on Charterparties, 16th ed., p. 56.

The owners of the *St. Elefterio* cannot be liable in personam and therefore there can be no jurisdiction in rem exercisable against their vessel.

T. G. Roche Q.C. and *H. V. Brandon* for the plaintiffs. This is a motion to set aside the writ and warrant of arrest on the ground that the court has no jurisdiction in rem. It is not a motion to strike out as disclosing no cause of action. A hearing to decide whether there is a right to proceed in rem must not develop into the trial of the action. The wording of section 3 (4) of the Administration of Justice Act, 1956, is "would be liable" and is not "who will or must succeed." It can never be said with certainty at the outset who will succeed in an action. Decisions have stood for years until overruled: *Hyams* v. *Stuart*

---

[2] (1880) 7 Rettie 521.

[3] (1949) 83 Ll.L.Rep. 438, 453.

[4] (1862) 11 C.B.N.S. 842.

King [5] and *Chandler* v. *Webster*.[6] Section 1 (1) (*h*) of the Act of 1956 is wider in its terms than the corresponding section of the Act of 1925 in that the new Act contains no restricting provision as to the domicile of the defendant owner of the vessel. Further, the section is wider in that it covers damages for fraud in carrying out the contract of carriage.

As to the question whether the plaintiffs' action is sustainable in law, *Walter Grieve, Son & Co.* v. *König & Co.*[7] was a claim in tort, whereas the court is now dealing with a claim in contract, as was the position in *Amis, Swain & Co.* v. *Nippon Yusen Kabushiki Kaisha.*[8] An indorsee of a false bill of lading can sue the shipowner in contract under an implied term of the contract to issue correct bills of lading. A party does not part with his right of action on parting with the bill of lading. The defendants delivered the goods and received the freight due after the bills of lading were signed, and, accordingly, the plaintiffs are entitled to rely on the principle of ratification. On rejection of the goods the rights passed back to the sellers: *Kwei Tek Chao and Others (Trading as Zung Fu Co.)* v. *British Traders and Shippers Ltd. N.V. Handelsmaatschappij J. Smits Import-Export.*[9]

The plaintiffs have disclosed a cause of action sustainable in law if it is necessary to consider that aspect of the case on this motion.

Ashton Roskill Q.C. replied.

WILLMER J. This is a motion by the defendants, the owners of the Panamanian steamship *St. Elefterio*, to set aside a writ in rem and warrant of arrest directed against their vessel.

The *St. Elefterio* was arrested by the plaintiffs in respect of a claim, stated in the endorsement of the writ to be a claim for "damages arising out of bills of lading relating to the carriage "of goods in the defendants' steamship or vessel, *St. Elefterio.*" The vessel, in fact, carried a cargo of cattle cake on a voyage from Montevideo to Liverpool early in this year. The plaintiffs' claim, as I understand it, is a claim by them as one-time holders of bills of lading, and is founded on an allegation that the bills of lading were wrongly dated on various dates in January of this year, whereas in fact none of the cargo was loaded before

---

[5] [1908] 2 K.B. 696; 24 T.L.R. 675.

[6] [1904] 1 K.B. 493; 20 T.L.R. 222.

[7] 7 Rettie 521.

[8] (1919) 1 Ll.L.Rep. 51.

[9] [1954] 2 Q.B. 459; [1954] 1 All E.R. 779.

February 6. The plaintiffs had in fact bought the cargo from the shippers thereof, who were also the charterers of the *St. Elefterio*, and the plaintiffs had, in their turn, resold the cargo to other purchasers. According to an affidavit sworn by the plaintiffs' solicitor, it appears that the bills of lading were in fact endorsed in blank by the shippers and presented to the plaintiffs. The plaintiffs did not themselves endorse the bills of lading, but they in due course presented them to their purchasers. Those purchasers, upon discovering that the goods were not in fact shipped on the date or dates specified in the bills of lading, claimed as against the plaintiffs the right to reject them. There seems to have been a dispute between the plaintiffs and their purchasers, which was submitted to arbitration. As I understand it, the arbitration has been concluded, though no award has yet been published. But clearly, counsel for the plaintiffs here expect that the purchasers are likely to be held entitled to reject the goods.

It is in such circumstances that the plaintiffs have brought this action against the ship, in an attempt to recover the loss which they expect to sustain.

The defendants contend that, on the true construction of the Administration of Justice Act, 1956, and in particular section 1 (1) (*h*) and section 3 (4) thereof, this court has no jurisdiction in rem to entertain the action.

It is argued, first, that section 1 (1) (*h*) is by its terms narrower than the corresponding provision contained in section 22 of the Judicature Act, 1925, because, whereas the former Act made specific provision for jurisdiction in tort in respect of goods carried, the paragraph in the new Act makes no corresponding provision. So far as that point goes I do not feel able to accede to the defendants' argument. In my judgment the words of section 1 (1) (*h*) of the Act of 1956, which I agree are different, and materially different, from the corresponding clause in the Act of 1925, are nevertheless wide enough to cover claims whether in contract or in tort arising out of any agreement relating to the carriage of goods in a ship.

However that may be, the main argument for the defendants turns on the construction of section 3 (4), and I think before I proceed to state the argument it would be desirable to set out the terms of that subsection. [His Lordship read the subsection and continued:] It is argued that, on the true construction of that subsection, before the plaintiffs can proceed in rem in respect, for instance, of a claim under section 1 (1) (*h*), they must show that the defendants, the owners of the ship proceeded against, are persons who would be liable on the claim in an action in personam. In pursuance of that contention various reasons have been advanced on behalf of the defendants for saying that, in the circumstances of this case, the defendants could not in law be held liable in respect of the plaintiffs' claim.

As I understood his argument, Mr. Roskill shrank from asserting that a defendant who claimed to have a good defence on the facts would be entitled to have the writ and arrest set aside, but he did claim that, if he could show a good defence in law, then, on the true construction of the section, there would be no jurisdiction to arrest the ship, and the action could therefore be halted in limine.

In the view I take it is not necessary for me to consider the validity of the various reasons advanced on behalf of the defendants for asserting that they have a good defence in law, but I think it would be appropriate, as the reasons have been advanced and have been the subject of some argument, if I state briefly what they were.

First, it was contended that shipowners cannot in law be held liable for damage said to be occasioned by a bill of lading being wrongly antedated, even if the antedating has been done as a result of a fraud on the part of the master. In support of that proposition reference was made to a decision of the Court of Session in *Walter Grieve, Son & Co.* v. *König & Co.*[1] Against that it was argued on behalf of the plaintiffs that that was a case where the claim was laid only in tort, and that it left untouched the question whether shipowners might not be liable in contract; and in connexion with that I was referred to a decision of Roche J., as he then was, in *Amis, Swain & Co.* v. *Nippon Yusen Kabushiki Kaisha.*[2]

Next it was argued on behalf of the defendants that the bills of lading must be presumed to have been signed as presented by the shippers, and that in those circumstances the shippers could not themselves have had any cause of action against the shipowners. It would follow, it was contended, having regard to the terms of the Bills of Lading Act, 1855, that the plaintiffs, as holders, would be in no better position, and would have no better cause of action than the shippers themselves. It was further argued that mere negligence in respect of the issue of a bill of lading would not give rise to any cause of action. Then it was said that the plaintiffs have not made out any title to sue; having sold the goods, and having passed on the bills of lading to their buyers, before the issue of the writ and the arrest of the ship they could not themselves have had any cause of action at that date, which was said to be the material date.

---

[1] (1880) 7 Rettie 521.

[2] (1919) 1 Ll.L.Rep. 51.

Lastly, it was contended that, since the shippers were also the charterers of the ship, the bills of lading, having been issued to them in fulfilment of the charterparty, were in any event no more than receipts for the goods, so that the mere fact of insertion of a wrong date in the bills of lading would give rise to no cause of action.

I need hardly say that none of these contentions advanced on behalf of the defendants was accepted as correct by the plaintiffs; but I do not propose to go into the merits of these various contentions now, or to decide whether the defendants are right or whether the plaintiffs are right. It seems to me, having regard to the view I take of the construction of section 3 (4) of the Act, that this is not the moment to decide whether the defendants are right or whether they are wrong in their submissions on the points of law raised. If they are right on all or any of these various points advanced, it may well be that in the end they will show a good defence to the action. But that, in my judgment, furnishes no good reason for setting these proceedings aside in limine, and thereby depriving the plaintiffs of the right to have these issues tried.

It has not been suggested that the proceedings are frivolous or vexatious, so as to call for the exercise of the court's inherent jurisdiction to halt such proceedings in limine. The defendants' argument is founded on the proposition that section 3 (4) of the Act of 1956 introduces a new restriction on the right to proceed in rem, and that a plaintiff cannot arrest a ship under that subsection unless he can prove—and prove at the outset—that he has a cause of action sustainable in law. In my judgment that proposition rests upon a misconception of the purpose and meaning of section 3 (4). As it appears to me, that subsection, so far from being a restrictive provision, is a subsection introduced for the purpose of enlarging the Admiralty jurisdiction of the court. As I view it, its purpose is to confer, and to confer for the first time in England, the right to arrest either the ship in respect of which the cause of action is alleged to have arisen or any other ship in the same ownership. That is an entirely new right so far as the law of England is concerned, although it previously existed in other countries, including Scotland; and the reason for conferring that right now is for the purpose of bringing this country into line with other countries as a result of an international convention. In my judgment the purpose of the words relied on by Mr. Roskill, that is to say, the words "the person who would be liable on the claim in an action in "personam," is to identify the person or persons whose ship or ships may be arrested in relation to this new right (if I may so express it) of arresting a sister ship. The words used, it will be observed, are "the person who would be liable" not "the person "who is liable," and it seems to me, bearing in mind the purpose of the Act, that the natural construction of those quite simple words is that they mean the person who would be liable on the assumption that the action succeeds. This action might or might not succeed if it were brought in personam; that would depend upon the view which the court ultimately took of the various contentions raised by Mr. Roskill. But clearly, if the action did succeed, the person or persons who would be liable would be the owner or owners of the steamship *St. Elefterio*. In such circumstances, in the absence of any suggestion that the action is a frivolous or vexatious action, I am satisfied that the plaintiffs are entitled to bring it and to have it tried, and that, whether or not their claim turns out to be a good one, they are entitled to assert that claim by proceeding in rem.

It is an odd circumstance, but it almost seems as if there must be some malignant fate which ordains that questions of this character so frequently arise on the last day of term, i.e., in circumstances in which, if the judge takes the wrong view, there is no practicable way of putting him right in the Court of Appeal without the possibility of inflicting irreparable damage on the party against whom the decision goes. I make that observation because I think it adds point to what I want to say in conclusion, namely, that any other construction of section 3 (4) of the Act, other than the construction I have sought to put upon it, would, as it seems to me, lead to the most intolerable difficulties in practice. If Mr. Roskill is right in saying that a plaintiff has no right to arrest a ship at all, unless he can show in limine a cause of action sustainable in law, what is to happen in a case (and, having regard to the argument I have listened to, this may be just such a case) where the questions of law raised are highly debatable, and questions on which it may be desired to take the opinion of the Court of Appeal or even of the House of Lords? Suppose, for instance, following Mr. Roskill's argument, that this court comes to the conclusion, on the preliminary argument held at this stage of the action, that the action is not one that is sustainable in law, it will presumably set aside the writ and the warrant of arrest. It is possible (these things have been known to happen) that a higher court might take a different view; but in the meantime the ship, which is a foreign ship, has been freed from arrest, has gone, and may never return to this country. It might be that in those circumstances the plaintiffs would have lost their right for ever to entertain proceedings in rem in this country.

The fact is, and this is the sanction against abuse, that the plaintiffs, if their alleged cause of action turns out not to be a good one, will be held liable for costs, and those costs will include the costs of furnishing bail in order to secure the release of the ship. The defendants can always secure the release of their ship by the simple expedient of furnishing bail. It is true that if, as they say it will, the action fails, they will probably not recover inter partes the whole of the costs of furnishing the bail; but in that respect I do not know that they are in any different position from other defendants in other types of action. That observation applies especially in these days of legal aid. There is many a defendant, who has been unsuccessfully sued, and who at the end of it all finds himself in the position that he cannot recover the whole of his costs. That is one of the incidents of litigation which, as it seems to me, parties have to accept in modern conditions.

But, as I have said, the simple remedy for the defendants, if they want their ship released, is to put in bail. The action will then be tried, and at the appropriate time—when all the facts have been ascertained—due consideration will be given to the arguments on law which the defendants desire to advance.

In my judgment, therefore, this motion is misconceived and I find myself unable to accede to it.

Judgment for plaintiffs.
Leave to appeal to the Court of Appeal.

Solicitors: *Richards, Butler & Co.; Holman, Fenwick & Willan for Weightman, Pedder & Co., Liverpool.*

A. S-R.

1956
Dec. 12, 19.

Sachs J.

FARRANT *v.* FARRANT.

Husband and Wife—Maintenance—High Court—Divorce—Order to pay school fees—Failure to comply with order—Right of attachment—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 4.

Contempt of Court—Debt—Maintenance order—School fees—Failure to pay—Right of attachment—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 4.

On a summons to attach a husband for contempt of court in failing to pay school fees under an order to ". . . pay the school "fees of the three younger children [of the marriage] at their "present school":—

Held, that the husband's obligation was in substance to pay a certain sum when it had been ascertained; as soon as the sum had been ascertained, therefore, any default upon his part was a "default in payment of a sum of money" under section 4 of the Debtors Act, 1869, as to which, in accordance with the terms of the Act, a writ of attachment could not issue.

Reg. v. *Pratt* (1870) L.R. 5 Q.B. 176 and *Leavis* v. *Leavis* [1921] P. 299; 37 T.L.R. 578 applied.

Bates v. *Bates* (1888) 14 P.D. 17; 5 T.L.R. 155 distinguished.

Application for attachment.

After proceedings in which the marriage of the parties had been dissolved at the suit of the wife an order was made by Mr. Registrar Forbes on June 18, 1956, by which the husband was to pay to the wife interim maintenance at the rate of £2 a week, payable weekly, and maintenance for the three younger children of the marriage at the rate of £1 a week each, payable weekly, until the age of 16 years or further order.

It was further ordered that the husband " do pay the school " fees of the three younger children at their present school," and, in addition, that he should keep up certain quarterly payments to an insurance company.

The husband made no payments of maintenance under the order and a suspended committal order was made in this respect. When the judgment summons upon which that order was made was issued the registry had refused to include in that summons a reference to the failure to pay school fees. On November 9, 1956, the wife issued a summons calling upon the husband " to " show cause why a writ of attachment should not be issued " against [him] for contempt of court in that [he had] not " obeyed the order herein dated June 18, 1956, to pay the school " fees of the three younger children at their present school."

At the hearing of the summons on December 12, 1956, the question was raised by the court whether attachment was a procedure to which resort could properly be made for a default of this nature and the matter was adjourned for further argument and the filing of further evidence.

K. Bruce Campbell for the wife. It has been held that a writ of attachment will issue in respect of a failure to comply with an order to give security for costs: *Bates* v. *Bates*.[1] If the behaviour of the husband in that case did not amount to a "default in the payment of a sum of money" neither does the conduct of the husband in the present case. A writ of attachment can, therefore, issue.

In view of the fact that a suspended committal order has already been made against the husband on a judgment summons in respect of the sums for maintenance, it will not now be possible to proceed against this husband in respect of the school fees by way of judgment summons. Moreover, the order does not specify that the school fees are to be paid to the wife and, for this reason also she may not be able to issue a judgment summons in respect of these fees. The wife may, therefore, find herself unable to enforce that part of the order and thus suffer considerable hardship.

The husband did not appear and was not represented.

SACHS J. This is an application on behalf of the wife, who was the petitioner in the original proceedings, to attach the husband on the ground of his default in complying with an order of this court made by Mr. Registrar Forbes on June 18, 1956.

The order was one by which the husband was to pay to the wife certain sums by way of maintenance for herself and the children of the marriage, and by which also the husband was ordered to keep up certain quarterly payments to an insurance company and to pay the school fees of the three younger children at their present school; and the attachment was sought in respect of non-compliance with that part which is in the terms: ". . . "do pay the school fees of the three younger children at their "present school." It was alleged that there had been wilful default on the part of the husband in paying certain of these fees.

When the application first came before me, I raised the point whether attachment was a procedure to which resort could properly be made for a default of this particular type. The matter was then adjourned for further argument on that point and for the filing of certain additional evidence.

---

[1] (1888) 14 P.D. 17; 5 T.L.R. 155.

Before the court can properly deal with the merits of the application it seems correct first to decide whether there is any jurisdiction to entertain the application at all.

It is, of course, well known that section 4 of the Debtors Act, 1869,[1] commences by enacting: "With the exceptions "hereinafter mentioned, no person shall be arrested or imprisoned "for making default in payment of a sum of money." Incidentally, those words are reflected in R.S.C., Ord. 42, r. 7,[2] which concerns the enforcement by attachment of judgments requiring persons to do acts "other than the payment of money."

After commencing in the terms just mentioned, the Act proceeds to state what the exceptions are. It is, however, rightly conceded that none of those exceptions apply to the present case, and, accordingly, the sole question is whether the default, if any, on the part of this husband constitutes a "default in payment of "a sum of money."

No case relating to non-compliance with an order to pay school or other fees or sums such as insurance premiums, has been cited to me; but the general principle applicable appears from cases such as *Reg.* v. *Pratt*,[3] where Lush J. said[4]: "The "words in the enacting part,—'default in payment of a sum of "'money,'—are advisedly used instead of 'debt,' in order to "include cases which might not properly have been called cases "of debt, such as costs on a judgment of nonsuit, or costs on a "verdict for the defendant, or damages in an action of tort, or "costs under a rule of court."

Of the various cases which have been decided on particular points relating to the above section, it is to be noted that attachment cannot lie in respect of an order for costs awarded by this court (see *Leavis* v. *Leavis*, *per* Hill J.[5]), but that, on the other hand, an order to give security for costs can be the subject of an attachment (see *Bates* v. *Bates* [6]), where emphasis was laid on the fact that the order related also to the giving of a bond.[7]

---

[1] Debtors Act, 1869, s. 4: "With "the exceptions hereinafter men"tioned, no person shall be arrested "or imprisoned for making default "in payment of a sum of money. "There shall be excepted from "the operation of the above enact"ment: . . . Provided, first, that "no person shall be imprisoned in "any case excepted from the opera"tion of this section for a longer "period than one year; and, secondly, "that nothing in this section shall "alter the effect of any judgment or "order of any court for payment of "money except as regards the arrest "and imprisonment of the person "making default in paying such "money."

[2] R.S.C., Ord. 42, r. 7: "A "judgment requiring any person to "do any act other than the payment "of money, or to abstain from doing "anything, may be enforced by writ "of attachment, or by committal."

[3] (1870) L.R. 5 Q.B. 176.

[4] Ibid. 182.

In my view, one has to look at the substance of the matter in the light of what was intended when the Debtors Act, 1869, was enacted. That intention does not depend so much on the precise words of the order of the court as on whether or not the real obligation of the person sought to be attached was one "to pay money."

As regards these school fees it seems clear that in substance the husband's obligation was to pay a sum certain when it had been ascertained. The moment that sum had been ascertained his obligation was clearly to pay money, and any default on his part was in truth a "default in payment of a sum of money" within the meaning of section 4. Thus the court has, in the present case, no power to order a writ of attachment to issue. Accordingly, no useful purpose can be served by going into the merits of the case.

It has been suggested to me that on the terms of this particular order it may not be possible for proceedings for default in paying the school fees properly to be taken by way of judgment summons: and if that be so, that the position of the wife in regard to enforcing so much of the order as relates to school fees may prove to be a difficult one. That may or may not be the case: it is an aspect of the matter with which I am not at present concerned. The position today is that the wife seeks to employ a procedure of a penal nature which impinges on the liberty of the subject: unless, therefore, she can strictly establish that she is entitled to avail herself of that procedure her application must fail.

Application dismissed.

Solicitors: *Langlois, Harding & Co.*

E. J.

---

[5] [1921] P. 299, 300–301; 37 T.L.R. 578.

[6] (1888) 14 P.D. 17.

[7] Ibid. 19.

1957
Mar. 18.

Collingwood J.

EASTERBROOK *v.* EASTERBROOK.

PRACTICE NOTE.

Husband and Wife — Maintenance — Divorce — Judgment summons — Children — Order for payment of maintenance to two children of the marriage — Summons issued by wife as next friend of both — Separate summonses required in respect of each debt.

Shelley v. *Shelley* (*No.* 2) [1952] P. 111; [1951] 2 T.L.R. 1224; [1952] 1 All E.R. 70, 72 explained.

A judgment summons was issued on February 15, 1957, in respect of arrears of maintenance for two children of a marriage which had been dissolved at the suit of the wife by a decree nisi of July, 1954, which was made absolute in September, 1954. The debt arose by virtue of an order dated March 9, 1955, which ordered the husband to pay, inter alia, maintenance to the two children at the rate of 30s. a week each. The judgment summons was issued by the wife as the next friend of the two children.

At the hearing the question was raised whether the proceedings had been properly commenced by the issue of one summons covering the total amount of the debt due to both children.

William Kee, for the wife as next friend, referred to *Shelley* v. *Shelley* (*No.* 2),[1] submitting that in that case, in which a similar form of maintenance order had been made, it did not appear from the report that more than one judgment summons was issued. He cited the opening and closing words of the judgment of Lord Merriman P.[2]

COLLINGWOOD J. I am now told that reference has been made to the record of the proceedings in *Shelley* v. *Shelley* (*No.* 2)[3] which shows that there were, in fact, two summonses on the file in that case.

The fundamental point is that there are two individual debts, one due to each of the two children. I cannot think that they can be the subject of the same judgment summons simply because the two children appear by the same next friend. Separate summonses must be issued in respect of what is due to each child.

Summons dismissed.

Solicitors: *Edward Fail & Co.*

E. J.

---

[1] [1952] P. 111; [1951] 2 T.L.R. 1224; [1952] 1 All E.R. 70, 72.

[2] [1952] P. 111, 114.

[3] [1952] P. 111.

POSTLETHWAITE *v.* POSTLETHWAITE.

1957
Feb. 25,
26, 27.

Willmer J.

Husband and Wife—Conduct conducing—Desertion, to—Conduct less than just cause—Conjugal unkindness—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 4 (2) (iv).

The reference to the discretionary bar in section 4 (2) (iv) of the Matrimonial Causes Act, 1950,[1] arising from "such wilful neglect "or misconduct as has conduced to . . . desertion" is to conduct which is not sufficiently bad to constitute just cause, but which is something worse than the ordinary wear and tear of married life. The phrase "conjugal unkindness," much used in connexion with the doctrine of revival after condonation, might be a fair way of expressing the sort of misconduct at which the statute is aiming when it talks of misconduct conducing to desertion.

Defended petition by husband for divorce on the ground of desertion. The wife by her answer denied the alleged desertion and pleaded that if her conduct did amount to desertion it was conduced to by wilful neglect and misconduct on the part of the husband, and asked for the petition to be dismissed. She did not specifically plead "just cause" for leaving.

The parties were married in 1942 and there were no children. At the time of the marriage the husband was serving in the Royal Air Force and the wife was residing with her mother in Leicester. Soon after the marriage the husband was posted to Canada, where he remained until 1945, being demobilized in May, 1946. During the period of his service the parties lived together when possible at the wife's mother's house.

After his demobilization the husband returned to his civilian occupation as an employee at a bank in Leicester. The parties continued thereafter to live at the home of the wife's mother, and the wife had a business of her own which consisted of a school for music and dancing, and which was reasonably successful. It was clear from the evidence that by 1946 the parties were no longer on very affectionate terms, and that there were sexual difficulties between them.

It was the husband's case that anyone in his profession who wanted to get on and obtain a reasonable degree of promotion

---

[1] Matrimonial Causes Act, 1950, s. 4 (2): ". . . Provided that the court "shall not be bound to pronounce a "decree of divorce and may dismiss "the petition if it finds that the "petitioner has during the marriage "been guilty of adultery or if, in the "opinion of the court, the petitioner "has been guilty—. . . (iv) where the "ground of the petition is adultery or "unsoundness of mind or desertion, "of such wilful neglect or misconduct "as has conduced to the adultery or "unsoundness of mind or desertion."

1957

POSTLETHWAITE
v.
POSTLETHWAITE.

must be prepared at some time to come to London and to work at head office. At first he deferred his request for a transfer because he knew that his wife did not desire to leave Leicester, but in 1949 he made an application to which his wife did not object; and in October, 1952, he received notice that he was posted to head office from a date approximately a fortnight ahead. He accepted the posting and went on November 8, 1952, although the wife stated that she was not only averse to leaving Leicester but had no intention of joining him in London. Apart from a visit by the husband to Leicester over Christmas, 1952, when the parties slept in separate rooms, they never lived together again, although the husband made attempts to get her to join him in London and in fact purchased a bungalow in High Barnet into which he moved in the autumn of 1953. The wife, however, refused to live there with him, although she came to see it in September, 1953, and in particular she refused in a letter written on November 30, 1953. Thereafter there was no further communication between the parties, and the husband ceased to contribute to the wife's maintenance. His petition was presented on January 2, 1956.

The case is reported upon the question of what may amount to wilful neglect or misconduct conducing to desertion; the nature of the allegations put forward in the answer is summarized in the judgment.

R. J. A. Temple Q.C. and *Cecil Binney* for the wife. It is conceded that the facts relied upon cannot amount in gravity to just cause, since that would itself negative the desertion "without "cause" which is the ground upon which relief is sought: Matrimonial Causes Act, 1950, s. 1 (1) (*b*). At the other end of the scale, conduct merely descriptive of the "fair wear and tear of "married life" could not be complained of. It is therefore submitted that misconduct conducing within the meaning of section 4 (2) (iv) of the Act in relation to desertion comprises breaches of matrimonial duty falling in degree between the two extremes, which can fairly be said to excuse, though not to justify, the offence of desertion. [*Beard* v. *Beard* [2] and *Cunnington* v. *Cunnington and Noble* [3] were referred to.]

Ifor Lloyd Q.C. and *C. A. Marshall-Reynolds* for the husband. The discretionary bar of misconduct conducing was confined up to 1937 to cases of adultery, and was first provided for by legislation under the Matrimonial Causes Acts in section 31 of the Act of 1857. It is understandable that the discretionary bar should be made applicable to cases of unsoundness of mind when incurable insanity was added as a ground for divorce in 1937; but it would seem that the application of the discretionary bar to the new ground for divorce of desertion was added per incuriam (if one can say that of the legislature), for it is really a surplusage of the requisite of desertion in section 1 (1) (*b*) of the Act of 1937, namely, that desertion should be "without cause."

---

[2] [1946] P. 8; 61 T.L.R. 555; [1945] 2 All E.R. 306.

[3] (1859) 1 Sw. & Tr. 475.

If, however, some meaning must be attributed to the words "such wilful neglect or misconduct as has conduced to the . . . "desertion," then it is agreed that it can only mean some conduct of a wrongful character which is something of less gravity than "just cause," which would in itself be a complete defence.

[Further argument was upon the facts. Counsel agreed that they could find no reported case, nor had they heard of one, in which the plea of misconduct conducing to desertion had been relied on.[4]]

WILLMER J. stated the facts and said that he had no doubt that it was the act of the wife which had brought an end to the cohabitation, and that the husband's act in going to London was a reasonable course for him to have taken from a business point of view. His Lordship referred to the efforts which the husband had made to get his wife to join him, and continued: On the first point, therefore, I entertain no doubt that during the three years preceding the presentation of the petition these parties were living separate and apart, in circumstances in which it was the wife who had brought to an end the previous state of things, and brought it to an end by refusing to join her husband in London. In those circumstances, it is necessary to inquire whether the wife had any just cause for such behaviour. As I have already pointed out, just cause was not specifically alleged in the wife's answer. However, I intimated to the wife's counsel in argument that I thought it was open on the pleadings, and, of course, it would in any case be my duty to consider whether the circumstances of the separation would warrant a finding of desertion.

I think I can deal with that question quite simply by saying that I am abundantly satisfied that the wife in this case does not show anything in the nature of just cause for absenting herself from her husband. The matters relied on, and the only matters that could be relied on, are those which have been alleged in detail in support of her alternative plea of misconduct conducing, and I think that I can best deal with the detailed criticisms of the husband that have been made when I deal with that aspect of the case.

---

[4] *Reporter's note*: The subsection was referred to in remarks made obiter by Lord Merriman P. in the Divisional Court, *Wood* v. *Wood* [1949] W.N. 59, 60.

So far as just cause is concerned, as I understand the law, that which is required to constitute just cause for one spouse living apart from the other spouse must be a grave and weighty matter, i.e., conduct of such a kind as, in effect, makes the continuance of married life together impossible. Quite clearly, in my judgment, nothing that has been alleged by the wife in this case goes anything like that distance. The things she complains of in her husband may have caused unhappiness in the home, and may have made him difficult to live with, but in my judgment they fall far short of anything which could amount to just cause, within the interpretation which, as I understand it, has to be put upon that phrase.

The only other element necessary to constitute the offence of desertion is absence of consent on the part of the husband. As to that, I am abundantly satisfied. I do not say that the husband throughout the whole statutory period of three years was desperately anxious to have his wife join him, but I am satisfied on the evidence that he was at all times willing that she should do so, and I am satisfied that he made every reasonable endeavour to get her to do so. In those circumstances, I am satisfied that for the three years preceding the presentation of the petition these parties were living separate and apart, due to the conduct of the wife—conduct inspired by an animus deserendi on her part, which is only too easily to be inferred from her actions and her letters. I further find that such separation was without the consent of the husband and that, in those circumstances, the matrimonial offence of desertion is complete.

I pause there only to remark that I rest my conclusion on the basis of a factum of separation which existed for the necessary time—a separation induced by the act of the wife. That, I think, is the correct approach. I say that, because it was strenuously argued on behalf of the wife that the husband could in no event obtain relief, on the ground that he had not actually made a specific offer of a matrimonial home for the wife until the autumn of 1953, when he acquired the bungalow to which I have already referred. That, if I may say so, seems to me to be the wrong approach.

It cannot be right that a husband, in circumstances such as these, is not entitled to say that desertion begins to run until such time as he has provided and furnished a matrimonial home and, so to speak, put it in a state of readiness to receive the wife. That seems to me to be a negation of the mutual matrimonial obligations which husband and wife must equally accept. When it becomes necessary, whether because of the husband's work or for any other reason, for the matrimonial couple to move from one place to another, it is no part of the duty of one spouse to go on ahead and prepare everything for the other; it should be a mutual operation, and in this case I have paid a good deal of attention to those letters from the husband, to which I have already referred, in which, writing from London, he was pleading with his wife to come up to London and help him to find accommodation.

It seems to me that the proper approach is to recognize that the duties of the spouses are mutual. In those circumstances, I do not think the argument based on the fact that there was no specific matrimonial home offered until the autumn of 1953 is an argument which commands any weight.

I am satisfied that the state of desertion existed for the necessary period of three years, and I can reach that conclusion without the necessity for deciding what might well be a debatable point—namely, whether cohabitation came to an end on November 8, 1952, or whether it came to an end on December 29, 1952. In either event the petitioner shows the necessary three years.

Accordingly I must next consider whether, desertion for the necessary period having been found, it is right to say that it was conduced to by wilful neglect or misconduct on the part of the husband, so as to call for the exercise of the discretion of the court. I am bound to say that I have not found this aspect of the case at all easy. So far as I know, and apparently so far as the knowledge and researches of the experienced counsel who have appeared before me go, this is the first case in which a plea of wilful neglect and misconduct conducing has been raised in answer to an allegation of desertion.

At first sight it struck me as being difficult to see exactly what the statute means by that phrase in relation to a charge of desertion, for if there is misconduct on the part of one spouse which in fact conduces—that is to say, is a cause of the other spouse leaving—it seemed to me prima facie that that would amount to the same thing as saying that there was just cause, and if that were so, then there would be no offence of desertion. In other words, prima facie it seemed to me difficult to envisage anything which could amount to misconduct conducing to desertion which would not automatically put an end to the charge of desertion. However, it has been submitted on behalf of the wife, and counsel for the husband did not dissent from the proposition, that some meaning must be attributed to this phrase which the draftsman has incorporated in the statute. The proposition was put forward by Mr. Temple, and I think it is not disputed by Mr. Ifor Lloyd, that there is an area—what he described as " a no man's land " —between that which is a grave and weighty matter, such as would amount to just cause, on the one hand, and that which, on the other hand, falls within the well-known phrase " the ordinary " wear and tear of married life." Small and trivial matters, if they fall within the ordinary wear and tear of married life, have on the authorities no legal significance. On the other hand, matters such as are of a sufficiently grave and weighty character as to amount to just cause would make it impossible to allege desertion at all. But it is said that there are degrees of conduct open to criticism between those two extremes, and that the court is required by the statute to examine the conduct of the deserted spouse to see whether it is of such a nature. Mr. Temple submitted that the phrase " conjugal unkindness," much used in connexion with the doctrine of revival after condonation, might be a fair way of expressing the sort of misconduct at which the statute is aiming when it talks of misconduct conducing to desertion.

Having given the matter some consideration, I have come to the conclusion that Mr. Temple's submission is broadly right. One must attribute some meaning to the statute, and, in those circumstances, the only meaning which I can attribute to it is that it refers to conduct which is not sufficiently bad to constitute just cause, but which is something worse than the ordinary wear and tear of married life, such as either spouse must be prepared to accept when he or she takes the other for better or for worse. In other words, as Mr. Temple put it, one must see if there has been conduct which falls short of justifying the separation, but which may, in part at least, excuse it. That seems to me very much a question of fact and of degree in the particular circumstances of any particular case, or if I may so express it, very much a jury question. I have, therefore, tried to approach the facts in this case as a jury would approach them, and to consider how they would appeal to the minds of ordinary people.

That makes it necessary to consider the wife's complaints in detail, because it is on her complaints that the question arises whether the husband has been guilty of such conduct as would go part of the way, at any rate, to excuse the wife's desertion.

The wife's complaints are set out very fully in the answer filed on her behalf, and are further developed in the voluminous further and better particulars of the answer which were subsequently delivered. First, complaint is made that from 1946 onwards the husband made no attempt to obtain a house for the parties to reside in. That, I think, refers particularly to the period when they were residing together in Leicester during the time when they in fact continued to reside at the house of the wife's mother. Next it is said that the husband moved to London, notwithstanding that the wife had frequently informed him that she did not desire to reside in London. Then it is said that from 1949 onwards, at any rate, the husband habitually went out drinking several nights a week and did not return sometimes until midnight or later. It is complained that he would come in smelling of drink, a circumstance to which the wife took exception.

Next, reliance is placed upon an incident, said to have taken place about May, 1950, when the wife apparently looked in a trunk of the husband's and discovered some magazines and pictures there, and the husband came in and caught her at it and told her to clear out. It is said that after that he kept his trunks and cases locked. It is complained that he behaved in a secretive manner; when he was writing, if she came into the room, he would cover up what he was writing, and in that connexion it is said that he arranged that his correspondence, i.e., letters arriving for him, should be enclosed in sheets of blank paper, so that the contents would not show through the outside of the envelope.

It is further complained that the husband habitually made wounding and insulting remarks to the wife, of which a selection of samples is set out in the answer; the one which the wife herself described in evidence as the worst thing he ever said was that he wanted to get rid of her and would be willing to pay the costs of divorcing her. Other wounding and insulting remarks of the same sort and character are alleged. Then it is complained that the husband habitually ignored and neglected the wife, and a number of occasions are referred to when he went off to social functions without taking her. In particular there was one social function, which took place just before his removal to London, which was in fact a party given by himself for his colleagues at the bank. The wife apparently complains that she was not invited to this farewell party of the husband's; it appears that no other wives were invited either. The wife also complained that on the very day before the husband left for London the husband, in effect, cut her dead in the street. As I understand it, the husband does not really controvert that statement, but he excuses himself, or seeks to excuse himself, on the ground that, being a man normally rather slow in the uptake, he was taken very much by surprise at suddenly seeing his wife at close quarters in a crowded street. There is another allegation of a wounding remark—a remark made on the occasion of a holiday, when the husband is alleged to have said that he had only taken the wife for the holiday so as to keep up appearances.

There were also certain allegations relating to the period after the husband had gone to London. It is said that he made no real effort to induce the wife to accompany him or join him there. Reference is made to the meeting in September, 1953, when the wife came up to visit the bungalow; it is said that the husband treated her like a stranger, and reliance is placed on the use of the word "rubbish," a word which the wife, at any rate, took to be referring to her own property and possessions.

Lastly, reliance is placed upon the fact that after the husband received the final letter of November 30, 1953—a letter, which, as I have already said, I would construe as a final refusal of his offer, and which the husband himself so construed—he never answered it or made any further approach to her.

I have considered these allegations, and so far as most of them are concerned, I am bound to say that I regard them as of an extremely trivial nature, such as could fairly be described as part of the ordinary wear and tear of marriage. Certainly that applies to most of them. As to the others, their importance depends upon my view of the credibility of the parties.

[His Lordship then considered the evidence relating to these allegations in detail and, referring to the complaints which arose after the end of 1952, continued:] During that period the wife was already in desertion and, on the authorities, it was for her, the deserting spouse, to make the first move. The burden was upon her to bring to an end the period of desertion which she had started by making some overture of her own towards the husband. Had she been able to say that she approached the husband with a view to reconciliation and that he repulsed her approaches, then she might have had a good answer to his charge of desertion; but to complain, when already in desertion and when he has already done his best to persuade her to join him, that he was not very polite to her on the occasion when she visited him, or that he did not answer her last letter in which she finally slammed the door, seems to me to be something very, very far from showing neglect or misconduct conducing to the desertion.

I have already found the offence of desertion proved, and that all the necessary ingredients of desertion are present. Having regard to what I have said about the charges brought by the wife, in all the circumstances of this case, bearing in mind my view of the evidence, I do not think there is any substance in the wife's complaints; that is to say, I do not think that the complaints which she puts forward go outside the ambit of the ordinary wear and tear of married life. Consequently, I am unable to find that the husband's conduct amounted to wilful neglect or misconduct conducing to her desertion.

I think it is important to remember that it is not the function of this court to try one party or the other for failing to make the other happy. That is not an issue which is for any court of law. Nor is the husband on trial as to whether he was a good husband or a bad husband. One of the risks one takes in contracting a marriage is that one takes one's spouse for better or for worse. It does not take the matter any further, in my judgment, to say that it was this party's fault, or that party's fault, that the quarrel developed which finally led to the end of the matrimonial cohabitation. My judgment does not necessarily mean, and it is not intended to mean, that I acquit the husband in this case of all blame. He is not a perfect man. Who is? No doubt, morally, he must bear his share of the responsibility for the break-up of the marriage. But it is the duty of spouses, even when they do quarrel, to try to make it up and continue their cohabitation.

What I do find in favour of this husband is that, despite the bad terms on which he got with his wife, he did go on trying to persuade her to live with him. My finding against the wife is that when the quarrels came and when this marriage came under strain, she did not respond to the husband's overtures; in that I think she was guilty of desertion and accordingly has no defence to this charge. For those reasons, in my judgment, the husband is entitled to the relief which he seeks.

Decree nisi.

Solicitors: *E. G. & J. W. Chester; Adam Burn & Son for L. E. Hutchinson, Leicester.*

J. B. G.

1956
Nov. 15;
1957
Mar. 6, 8.

Willmer J.

DAY *v.* DAY.

Husband and Wife — Desertion — Adultery by petitioner — Adultery before inception of desertion—Whether absolute bar to finding of desertion—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*b*).

By section 1 (1) (*b*) of the Matrimonial Causes Act, 1950: ". . . a petition for divorce may be presented . . . on the ground "that the respondent— . . . (*b*) has deserted the petitioner without cause for a period of at least three years immediately "preceding the presentation of the petition."

A husband, who had left his wife in 1943 in circumstances amounting to a consensual separation, committed two acts of adultery in 1944 and informed his wife, who took, however, no steps to divorce him. In May, 1953, he made a bona fide offer of a reconciliation which was rejected. At no time did the wife object to the adultery (which was the only adultery committed) nor did the question of connivance or misconduct conducing, or of condonation, arise.

On the husband's undefended petition for divorce on the ground of desertion since 1953:—

Held, (1) that if a party alleging desertion proved to the satisfaction of the court that his adultery was not the cause of the desertion complained of, a fortiori if he could show that its inception or continuance was in fact due to quite other causes, he would be entitled to a finding of desertion in his favour. The statute made no distinction between "cause" in relation to the inception of desertion, and "cause" in relation to its continuance.

(2) That since on the facts of the present case the husband had affirmatively proved that the mind of the wife was not in any way affected by her knowledge of his adultery, he was entitled to a finding of desertion "without cause," and that as it was a proper case for the court to exercise its discretion in his favour, he should be granted a decree.

Herod v. *Herod* [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722 applied.

Williams v. *Williams* [1943] 2 All E.R. 746, 751 followed.

Per curiam. It is unfortunate that when a question of importance arises in an undefended suit in which the Queen's Proctor has been invited to assist the court in argument, no machinery exists, if the decision of the court is in favour of the petitioner, for submitting that decision to a higher court.

UNDEFENDED PETITION by a husband for divorce on the ground of desertion. The assistance of the Queen's Proctor in argument was invoked.

The following statement of facts is taken from the judgment. The parties were married in 1919, and there were four children of the marriage, all daughters, born respectively in 1920, 1924, 1926 and 1928. In 1928, after the birth of the youngest child, the wife refused to have any further marital intercourse, and about 1933 withdrew from the husband's bedroom. She became cold towards the husband, and this led to quarrels. Quarrels also arose out of the association of the wife with another woman, to whom the husband took exception. The husband said that his wife was always nagging and quarrelling, and eventually, about 1939, he informed her that as soon as the youngest child was 14 he proposed to leave her. The wife replied to the effect, "Take your money and don't come back any more." Consequently in 1942, when the youngest child reached the age of 14, the husband in fact left. In 1943 the husband returned to the matrimonial home for two periods of two weeks each, the first occasion being during convalescence after an illness, and the second occasion, towards the end of the year, being for a holiday. On the latter occasion the parties shared a bedroom, and sexual intercourse took place during the first week. The wife then again refused intercourse, saying, as she had said before, that she found it disgusting and that she would not have it again. Since the end of 1943 the parties had been continuously separated, the husband paying only occasional visits to the matrimonial home, usually in connexion with family occasions, such as children's weddings. There had been no further marital intercourse, and the court was unable to find that any of the husband's visits amounted to a resumption of cohabitation.

In early 1944 the husband wrote to the wife asking whether, if he committed adultery, she would give him his freedom. The wife replied, "I will see about it." Shortly afterwards the husband in fact committed adultery, as disclosed in his discretion statement—namely, two acts of adultery with an unknown woman at a hotel, about Easter, 1944. The husband informed the wife of the fact of his adultery, but the wife took no steps towards seeking a divorce. Nor did she at any time make any complaint against the husband for having committed adultery.

The parties continued living separate and apart, and in early 1953 the husband, apparently having disposed of his business, and being then a man of over 60 years of age, wrote to his wife suggesting that he might return and resume cohabitation with her. The wife stated in her letter in reply: "If you have "your heart in coming back here, then it is up to you, but it "will not be easy, we have been parted too long now, you "have pleased yourself in the way you live and I likewise, but "come by all means. You will need a job, and I will want "more than £1 a week, but I am afraid I do not want to act as "a wife any more, this was the reason I was so hateful before. "I do not like intercourse, but there are other things in life "without that."

There was further correspondence between the parties, substantially in the same strain, the wife maintaining her attitude that, if the husband returned, it would in effect be as a lodger only. In none of her letters did she refer to the fact that the husband had committed adultery, or put this forward as a reason for not receiving him back as a husband. The husband was not prepared to return on the wife's terms, and never in fact did so. Moreover, although up to 1953 he continued to maintain the wife, he ceased to do so after the wife's refusal to receive him back as a husband. The wife never took proceedings against the husband for maintenance.

By his petition the husband alleged desertion on the part of the wife since about May, 1953, on the basis of the wife's refusal to accede to his request for a resumption of cohabitation. It was implicit in the manner of presentation of the petition that the separation prior to 1953 was consensual, the gist of the husband's case being that by his invitation to resume cohabitation he then withdrew his consent to the continued separation, so that the wife, by refusing his invitation and continuing the separation without his consent, became a deserting party. It was suggested in argument that it would be open to find, on the facts proved, that the wife had been guilty of constructive desertion ever since the original parting, or at least since 1943, but there was no application to amend the petition, and the contention was later withdrawn.

At the initial hearing on November 15, 1956, Willmer J., upon a submission that the evidence showed that the wife's mind had not been affected by her knowledge of the adultery, and that desertion should therefore be found in view of her rejection of his attempts to effect a reconciliation, asked: "But "does this touch the question? Ever since that adultery was "committed, the wife has had just cause, has she not? It does "not matter whether she has said she would rely on it or not. "She has in fact a good reason for not living with her husband, "he having committed adultery about which she knows."

James Comyn and *Roger Gray* for the Queen's Proctor, whose assistance in argument was invoked under section 10 of the Matrimonial Causes Act, 1950.[1] It is accepted upon the evidence that the wife at no time raised any objection to her husband's adultery, and that she would never have lived with him again even if she had been completely ignorant of that adultery.

But although it is well established since *Herod* v. *Herod*[2] that desertion is not necessarily terminated by the adultery of the deserted spouse which has taken place since desertion began, there is a fundamental difference between adultery committed before and after the inception of desertion. In the latter case the only question is whether the continuance of the desertion has been affected; but in the former the question is whether desertion can ever be held to begin without impliedly asserting a duty on the part of the alleged deserter to cohabit with an adulterous spouse. The onus is on the petitioner to prove desertion without cause; and it is, accordingly, submitted that that burden cannot be discharged if the petitioner has been guilty of prior and uncondoned adultery. This would be so even if the respondent were ignorant of that adultery, and had so remained up to the date of the petition, or if the respondent had not relied on it as just cause for refusing to cohabit, but had refused for some entirely different reason.

James W. Miskin for the husband. Although the decision in *Herod* v. *Herod*[2] concerned a case in which the adultery had taken place after the inception of desertion, it is submitted that the principle is equally applicable to a case such as the present. In support of that submission reliance is placed on passages in *Herod* v. *Herod*[3] and also in *Williams* v. *Williams*.[4] The evidence here shows that the wife had at all times been indifferent to the husband's adultery, to which her mind had never turned when she later refused to resume cohabitation. That refusal had been based upon entirely different reasons, including an aversion to marital intercourse which had existed prior to the adultery.

---

[1] Matrimonial Causes Act, 1950, s. 10: "In the case of any petition "for divorce or for nullity of marriage "—(1) The court may, if it thinks fit, "direct all necessary papers in the "matter to be sent to [Her] Majesty's "Proctor, who shall under the direc-"tions of the Attorney-General in-"struct counsel to argue before the "court any question in relation to the "matter which the court deems to be "necessary or expedient to have fully "argued, and [Her] Majesty's Proc-"tor shall be entitled to charge the "costs of the proceedings as part of "the expenses of his office."

[Subss. (2) and (3) concern information of any matter material to the due decision of the case which is given to the Queen's Proctor, and his powers to intervene.]

[2] [1939] P. 11; 54 T.L.R. 1134; [1938] 3 All E.R. 722.

[3] [1939] P. 11, 24.

[4] [1943] 2 All E.R. 746, 751.

Roger Gray in reply.

The respondent wife did not appear and was not represented.

Cur. adv. vult.

WILLMER J., reading his judgment, stated the facts and continued: In the circumstances I decline to find that there was any desertion on the part of the wife at any time prior to 1953. I am satisfied that the separation until that date was consensual, and that the petition as drawn puts forward the husband's case in the only way it could be put forward. I am satisfied that the husband's offer to resume cohabitation in 1953 was bona fide, in the sense that he did genuinely desire to resume cohabitation as husband and wife. I find that the wife did not in 1944, or at any other time, raise any objection to the fact of the husband having committed adultery. She did not put that forward as a ground for refusing the husband's offer to return; nor has she put forward any other grounds which, in my judgment, could amount to just cause for refusing to receive the husband back.

The facts, as set out above, raise in the neatest possible form a question which, to my mind, goes to the root of the law relating to desertion, and about which, so far as I am aware, there is no direct authority—namely, whether a spouse, who has admittedly been guilty of the matrimonial offence of adultery prior to the inception of the alleged period of desertion, can ever successfully plead that the other spouse has been guilty of desertion without cause, notwithstanding that that other spouse does not seek to rely on the adultery as just cause for the separation. The question appeared to me to be one of such fundamental importance that I thought it right to ask for the assistance of the Queen's Proctor, so that the matter could be fully argued before me. In the result I have had the advantage of listening to a most helpful and interesting argument by Mr. Comyn on behalf of the Queen's Proctor, and I should like to express my indebtedness to him, as well as to Mr. Miskin, for the clear and lucid way in which they presented their submissions.

In the case of adultery committed by a petitioner after he or she has been deserted, it is well settled that the desertion is not necessarily terminated as a matter of law. If the petitioner can show that the respondent did not know of the adultery, or, if it was known, that his or her conduct was not in any way affected by it, the desertion will be held to be still continuing, and it becomes a matter for the discretion of the court whether, having regard to the petitioner's adultery, relief should be granted. Such is the effect of the well-known decision of Lord Merriman P. in *Herod* v. *Herod* [1]—a decision which has many times been approved by the Court of Appeal, and which has been frequently followed in this court. The argument for the petitioner in this case has been that precisely the same considerations apply to adultery committed before the inception of desertion as apply to adultery such as was in question in *Herod* v. *Herod*.[1] It is fair to say that until today that has been the generally accepted view, as is shown by the comments of modern textbook editors—see, for instance, Latey on Divorce (14th ed., p. 173) and Rayden on Divorce (6th ed., pp. 138–139, particularly note (a)). Moreover, it is clear that this was the view of Lord Merriman P. at the time when he decided *Herod* v. *Herod*,[1] as is shown by some remarks which he made obiter in the course of his judgment in that case. Lord Merriman P. said [2]: "It may be said that "this line of reasoning would enable a spouse whose adultery, "not condoned, had preceded the alleged desertion to obtain a "decree at the discretion of the court, whereas such adultery "at least ought on principle to be held to cause or excuse the "desertion. But, in my opinion, precisely the same consideration applies. If it is left in doubt whether the respondent "knew of the adultery or, if known, whether his or her conduct "was affected by it, the petitioner would fail to discharge the "burden of proof. But, if it were established that the respondent's intention to withdraw from cohabitation was formed "entirely independently of the petitioner's misconduct, the "offence would be proved. The question is to be determined "according to the circumstances of each case. I do not think "that a spouse could be heard to say that adultery at which he "or she has connived or to which his or her conduct has conduced, is a reasonable excuse for desertion."

Arising from what is said in that last sentence, I think it right to say that in the present case it has not been suggested, and I do not find, that the wife connived at the husband's adultery, or that her conduct conduced to it. Nor has she ever condoned it. The most that has been said in this case is that the circumstances in which the husband's adultery occurred—more especially having regard to the wife's apparent indifference to it—would be matters properly to be taken into consideration if I am satisfied that the charge of desertion is made out and it becomes necessary to exercise my discretion.

---

[1] [1939] P. 11.

[2] Ibid. 24.

The view expressed by Lord Merriman P. in the passage from his judgment in *Herod* v. *Herod*,[2] to which I have just referred, gains further support from some remarks made by du Parcq L.J., in *Williams* v. *Williams*,[3] to which my attention was called. That again was a case in which the adultery in question was committed after a period of desertion had commenced. Accordingly, in so far as what du Parcq L.J. said referred to adultery committed before any act of desertion, his remarks must equally be treated as obiter. He is, however, reported to have said this[3]: "When it is apparent that facts existed which, "if they influenced the deserting spouse, were a sufficient cause "to excuse the desertion, it is for the deserted spouse to prove, "to the reasonable satisfaction of the tribunal, that those facts "did not operate to cause the desertion or its continuance."

It is clear, therefore, that such opinions as have been expressed hitherto have been in favour of the view that no distinction in principle is to be drawn between adultery committed before and that committed after the time when desertion is alleged to have started. Notwithstanding these expressions of view, however, it has been argued on behalf of the Queen's Proctor, now that the matter has arisen directly for decision, that there is a fundamental difference in principle between adultery committed before the inception of the alleged desertion and that committed during its continuance. In the latter case one starts with the matrimonial offence of desertion already current, and the only question could be as to whether its continuance is affected by the subsequent adultery. In the former case the question is whether a charge of desertion can ever be got on to its legs (if I may use that expression) without asserting a duty on the part of the alleged deserter to continue cohabitation with a spouse who ex hypothesi has been guilty of adultery. Is the situation altered upon proof that the alleged deserting spouse did not know of the adultery, or that his or her mind was not in fact affected thereby? Even so, he or she cannot continue to cohabit with, or (in the case of spouses already separated) cannot take back, the adulterous spouse without condoning the adultery. Yet, on the petitioner's argument, this is precisely what he or she must do in order to avoid being held a deserter.

---

[2] [1939] P. 11, 24.

[3] [1943] 2 All E.R. 746, 751.

A simple illustration will, I think, suffice to show the force of the argument on behalf of the Queen's Proctor. Take the case of a husband who, during cohabitation, commits adultery, and thereafter for years succeeds in concealing it from his wife. Later the wife, still in ignorance of the husband's adultery, leaves him for quite other reasons—reasons which could not of themselves be said to give her just cause, e.g., unreasonable refusal to follow her husband to another part of the country when his work necessarily requires him to live there. After three years the husband files a petition on the ground of desertion and, being an honest man, discloses his adultery and asks for the discretion of the court to be exercised in his favour. Too late—for the petition is already on the file—the wife learns for the first time of the husband's adultery. What is she to do? On the argument for the petitioner she has no defence to the charge of desertion, for her ignorance of the adultery precludes her from setting that up as a justification for her refusal to cohabit with her husband. To avoid being found a deserter she must, therefore, go back to her husband (if he is then willing to withdraw his petition and take her back), and thereby willy-nilly condone his adultery. It may be said that in such a case there would be good grounds for refusing to exercise the court's discretion in favour of the petitioning husband; but that does not get rid of the difficulty that there would still be a finding of desertion against the wife and in favour of the adulterous husband.

Similar considerations would apply in the case of a husband who, when already in desertion, proceeds to commit adultery which he conceals from his wife. Suppose such a husband subsequently makes a bona fide offer to return. The wife, being ignorant of the adultery, cannot refuse to have him back on that ground. She rejects his offer on other, and insufficient, grounds. Is it to be said that, in accordance with the principles of *Pratt* v. *Pratt*,[4] she not only terminates her husband's desertion, but is herself liable to be held in desertion from that time onwards, notwithstanding the adultery of her husband of which she is ignorant?

---

[4] [1939] A.C. 417; 55 T.L.R. 910; [1939] 3 All E.R. 437.

Having regard to the difficulty of cases such as these, it was submitted on behalf of the Queen's Proctor that one spouse cannot set up a case of desertion against the other, if he or she has been guilty, himself or herself, of antecedent, uncondoned adultery, notwithstanding that the other spouse does not know of such adultery or does not seek to rely on it as affording just cause. The fact of antecedent adultery, it is said, is not something analogous to a Statute of Limitations—i.e., something which affords a valid defence if the point is taken by the other spouse, but otherwise of no effect. On the contrary, it is contended, it is the duty of the court, in the public interest, to take the point and to withhold relief, notwithstanding that the other spouse did not know of, or was unaffected by the knowledge of, the prior adultery. The onus is on the petitioner, whether the case be defended or undefended, to prove that the desertion complained of was without cause, and this he cannot do if he has to admit that he has been guilty of prior and uncondoned adultery.

I hope that I have fairly stated the arguments addressed to me on behalf of the Queen's Proctor. I certainly feel their force, and it is not without hesitation that in the end I have found myself unable to accede to them. But I am not prepared to differ from the views expressed by Lord Merriman P. and by du Parcq L.J. in the cases to which I have already referred, or to hold that there is any distinction in principle between adultery committed prior to the inception of the desertion alleged and adultery committed during the continuance of desertion already current. Apart from the weight which must naturally be attached to the dicta of Lord Merriman P. and du Parcq L.J., I should myself arrive at the same conclusion as a matter of construction of the words of the statute which I have to apply. By section 1 (1) of the Matrimonial Causes Act, 1950, a petition for divorce may be presented "on the ground that the respondent— . . . (*b*) has deserted the petitioner without cause for a "period of at least three years immediately preceding the presentation of the petition." The statute makes no distinction between cause in relation to the inception of desertion and cause in relation to its continuance. In either case the question to be decided is whether the desertion was without cause. On the wording of the statute the inquiry as to whether there was cause must be the same, whether the petitioner's adultery was committed before the inception or during the continuance of the desertion complained of. So far as the wording of the statute is concerned, therefore, I can see no distinction between adultery before and adultery during the currency of the desertion alleged. The editors of Rayden on Divorce (6th ed., p. 138), in the note to which I have already referred, suggest that the word "cause" in the statute must mean effective cause. I am aware that the practice of attaching epithets to the word "cause" has been frowned on by no less an authority than Lord Sumner—see *British Columbia Electric Railway Co.* v. *Loach* [5]—but at least one may be permitted to hold that a cause is something which causes. This, indeed, seems to me to be the ratio decidendi of *Herod* v. *Herod*,[6] so far as concerns adultery committed during the continuance of desertion already current, and, in my judgment, the same effect must be given to the word in relation to adultery committed prior to the inception of the desertion alleged. If the petitioner has in fact, by his own misconduct—be it adultery or cruelty—caused the desertion of which he seeks to complain, either in its inception or in its continuance, then clearly he cannot bring himself within the words of the statute. But if he proves to the satisfaction of the court that his adultery was not the cause of the desertion complained of, whether in its inception or in its continuance—a fortiori if he can show that its inception or continuance was in fact due to quite other causes, such as would not afford any legitimate excuse—then, in my judgment, he brings himself within the statute and is at least entitled to a finding of desertion in his favour. Whether or not he is to obtain relief will then be a matter calling for the exercise of the court's discretion.

It is not disputed that the burden is on the petitioner to satisfy the court that his adultery was not the cause of the desertion complained of. On the facts of this case that involves the husband proving affirmatively that the mind of the wife was not in any way affected by her knowledge of the husband's adultery. Clearly the burden is a heavy one, and doubtless, in many cases, it will be one that a petitioner will not be able to discharge. In the present case the petitioning husband has, in my judgment, discharged the burden. Having seen her letters, I am satisfied that the mind of the wife was quite unaffected by her knowledge of the husband's adultery, and that neither that nor any other misconduct on the part of the husband was the cause of the wife's refusal to resume cohabitation with him.

---

[5] [1916] 1 A.C. 719.

[6] [1939] P. 11.

1957

Day v. Day.

Willmer J.

In the absence of evidence of any other grave and weighty matter, I find that the wife's refusal was without just cause, and in such circumstances I am satisfied that the wife was guilty of desertion without cause.

That leaves only the question whether in all the circumstances of the case I ought, in my discretion, to grant this husband the relief prayed for. In approaching that question I pay regard, as a mitigating circumstance, to the fact that neither before its commission—when the husband was threatening to commit adultery—nor at any time since has the wife voiced any objection whatsoever to the fact of the husband's adultery. Neither in the interests of the parties themselves, nor in the public interest, can there be any virtue in perpetuating a marriage, which for the last 15 years has been a marriage in name only. In the circumstances I propose to exercise my discretion in favour of the husband, and to pronounce a decree nisi accordingly.

I confess that I have reached this conclusion with some measure of regret. That is not because I begrudge the husband the relief to which I have held him entitled. My regret is due to the fact that there will be no opportunity for reviewing my decision in a higher court. But it is inherent in the procedure under section 10 of the Matrimonial Causes Act, 1950,[7] that the Queen's Proctor, when he is invited to assist the court by attending to argue a question of law such as arose in this case, does not become a party to the suit, and, accordingly, has no right of appeal. For myself I am disposed to think that it is unfortunate that, when a question arises of such importance as that which has arisen in this case, no machinery exists, if the decision of this court is in favour of the petitioner, for submitting that decision to the consideration of a higher court.

Decree nisi.

Solicitors: *R. H. Marcus, Law Society, Divorce Department; The Queen's Proctor.*

J. B. G.

---

[7] See footnote 1, p. 205, ante.

NOKES *v.* NOKES.

1957
Jan. 25.

Barnard J.

C. A.

1957
June 3.

Hodson, Parker and Ormerod L.JJ.

Husband and Wife — Maintenance — Divorce — Paternity—Estoppel— Husband denying paternity — Maintenance order in favour of "child of the marriage" made by registrar — No jurisdiction in registrar to determine issue of paternity—Husband not estopped from denying paternity—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1) — *Matrimonial Causes Rules*, 1950 (*S.I.* 1950, *No.* 1940/*L.*27), *rr.* 27, 29 (1).

Husband and Wife—Paternity—Jurisdiction—Registrar.

Estoppel—Per rem judicatam—Husband and wife—Paternity.

Where the paternity of a child is in issue, a registrar is not a court of competent jurisdiction to determine that issue by making an order under section 26 (1) of the Matrimonial Causes Act, 1950,[1] for maintenance of that child, for the Matrimonial Causes Rules, 1957,[2] require that such an issue shall be determined by a judge.

A wife, who had borne a child some two months after her marriage, and had later obtained from justices orders against her husband for maintenance and custody of the child, subsequently petitioned for divorce, but did not ask for the custody of the child, and no order as to custody was therefore made. After the decree of divorce had been granted she applied for maintenance for herself and "the child of the marriage" [sic] under section 26 (1) of the Matrimonial Causes Act, 1950. The husband, who had previously denied before the justices that he was the father of the child, offered in his affidavit on the wife's application to continue his previous payments of maintenance in respect of "my "daughter"; but at the hearing of the wife's application before the registrar he again denied paternity. The registrar made the order for maintenance payable to "the child of the marriage." Later the husband applied to vary that order, and again denied paternity; but the registrar dismissed his application. The husband appealed to the judge, who directed that the issue as to paternity be tried.

On the preliminary point taken for the wife that the husband was estopped from denying paternity per rem judicatam, namely, the order of the registrar under section 26 (1) Barnard J. held that the present case was covered by *Lindsay* v. *Lindsay* [1934] P. 162; 50 T.L.R. 441, and made a declaration that the husband was the father of the child. On appeal by the husband:—

---

[1] Matrimonial Causes Act, 1950, s. 26: "(1) In any proceedings for "divorce or nullity of marriage or "judicial separation, the court may "from time to time, either before or "by or after the final decree, make "such provision as appears just with "respect to the custody, maintenance "and education of the children the "marriage of whose parents is the "subject of the proceedings, or, if it "thinks fit, direct proper proceedings "to be taken for placing the children "under the protection of the court."

[2] Matrimonial Causes Rules, 1957, r. 27: "An application for directions "for the separate trial of any issue "or, except in a case to which Rule "14 (2) applies, of any question as to "the jurisdiction of the court shall "be made to a judge." R. 29: "(1) "Unless otherwise directed, all "causes or issues shall be tried by "a judge alone."

Held, that there was no estoppel as alleged, for the order of the registrar which declared that the child was the child of the marriage was an order which he had no jurisdiction to make.

Lindsay v. *Lindsay* (supra) distinguished.

Decision of Barnard J. reversed.

Issue as to the paternity of a child. The matter arose on maintenance proceedings after decree absolute.

The parties were married on August 8, 1950, and two months later, on October 15, 1950, the wife gave birth to a child, Marion Violet. On January 8, 1952, proceedings took place before a London magistrate under the Guardianship of Infants Acts, 1886 and 1925. The husband appeared in person and denied that he was the father of the child; but an order was made against him. Shortly after, the parties came together again; but on May 16, 1952, the wife obtained from the Southend justices a separation order against the husband. She was granted the custody of the child and the husband was ordered to pay £1 a week for her maintenance and £1 a week for the maintenance of the child. In May, 1954, that order was revoked on the wife's application, in connexion with her petition for divorce, which was filed on May 22, 1954. In her petition the wife stated that "there is "issue of the marriage now living one child, namely, Marion "Violet, born on October 15, 1950." She set out the previous proceedings before the justices, including the order of May 16, 1952, awarding her the custody of the child, but did not ask in her petition for custody of the child or for maintenance.

The petition was undefended, and on October 29, 1954, the wife obtained a decree nisi which was made absolute on December 13, 1954.

In February, 1955, the wife filed a notice of application for maintenance under section 26 (1) of the Matrimonial Causes Act, 1950,[1] stating that she intended to apply to the court for an order that the husband should pay such sum by way of maintenance for herself and for Marion Violet, "the child of the marriage," as might be just. The husband appeared in person to that notice and filed an affidavit of his means in accordance with the Matrimonial Causes Rules, 1950, in which he averred that he objected to paying his ex-wife any maintenance, as she had remarried, but offered to continue his payments of £1 a week "in respect of my

---

[1] See note on p. 213.

1957

NOKES
v.
NOKES.

"daughter Marion Violet." The wife's affidavit in reply stated: "I have the custody of the child of the marriage, Marion Violet, "born on October 15, 1950." On the hearing before Mr. Registrar Townley Millers on May 13, 1955, the husband again appeared in person and again denied that he was the father of the child. Despite that denial, the registrar made an order that he should pay maintenance to the wife at the rate of 1s. per annum " . . . and to Marion Violet Nokes the child of the marriage between the petitioner and the respondent maintenance "until further order at the rate of £1 7s. 6d. per week. . . ." There was no appeal against that order; but on November 22, 1955, the husband, again acting in person, filed an application to vary the order of May 13, 1955, made by the registrar; and in support thereof he swore an affidavit in which he denied paternity, referring to the child as "the child born to [the wife] during "my first marriage and condoned [sic] by me." The registrar dismissed that application on January 17, 1956. The husband appealed; and on February 14, 1956, Davies J. ordered that an issue should be tried as to the paternity of the child, in which the husband should be the plaintiff and the wife defendant. Both parties had by that date remarried.

The husband by his statement of claim pleaded his marriage on August 8, 1950, and a decree nisi dissolving that marriage on October 29, 1954, made absolute on December 13, 1954. He went on to plead that he knew at the time of his marriage that his wife was pregnant; that she gave birth to the child in question shortly after the marriage; he admitted that the marriage had been entered into on the footing that he would treat the child as his own and that it had been registered so as to show him to be the father of the child; but he claimed that in a letter written to him by his wife in the early days of the marriage (which he was able to produce) she had freely admitted that he was not the father of the child. In defence to the plea the wife relied solely on a plea of estoppel per rem judicatam, claiming that the husband ought not to be allowed to say that he was not the father of the child, in view of the facts that on May 13, 1955, after the affidavit sworn by him offering to continue payments in respect of "my daughter," the registrar had ordered him to pay maintenance under section 26 (1) in respect of the child; that that order could only have been made on the footing that that child was a child "the marriage of whose parents is the subject "of the proceedings"; and that there had been no appeal from that order.

1957

NOKES
v.
NOKES.

The issue as to paternity came before Barnard J. on those pleadings.

Robin Dunn for the wife. The husband is estopped from denying the paternity of the child in view of the order for maintenance, which has been made under section 26 (1) of the Matrimonial Causes Act, 1950. Such an order could not have been made unless the child was a child of the parties within the meaning of the subsection: the parenthood of the child was a matter fundamental to the making of that order, and the husband cannot now, therefore, assert the contrary: *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[3] The case is covered by *Lindsay* v. *Lindsay*,[4] where the husband was estopped from denying paternity after an order had been made under the corresponding subsection for custody. [*Woodland* v. *Woodland*[5] and *Watson* v. *Watson*[6] were also referred to.]

F. Maurice Drake for the husband. This case is to be distinguished from *Lindsay* v. *Lindsay*,[7] where the order for custody was made upon the prayer of the petition. The matter of paternity has never been directly in issue here, nor argued in any court in which a direct order has been made.

BARNARD J. stated the facts, observing that an order made by justices was not an order of a court of record, and was not binding on the Divorce Court. Nobody could suggest, or had suggested, that the justices' order of May 16, 1952, in any way created an estoppel.

His Lordship continued: The presumption of law in a case of this kind is a very strong one. It is very strongly in favour of legitimacy, and very cogent and clear evidence is required to rebut that presumption. Counsel for the wife has quite properly taken a preliminary point contending that the husband on the facts of this case is estopped from denying the paternity of the child by reason of the order of May 13, 1955, which orders him to pay maintenance for the child of the marriage. The requisite provision is section 26 (1) of the Matrimonial Causes Act, 1950. [His Lordship read the subsection and continued:]

On this question of estoppel I was referred to *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[1] Both counsel accept it as being applicable to this case, and it is obviously binding on all of us because it is a decision of the House of Lords. The passage to which both counsel referred me is from Lord Romer's speech [2]: "It is no doubt true to say that whenever a question has in substance been decided, or has in substance formed the ratio of, or been fundamental to, the decision in an earlier action between the same parties, each party is estopped from litigating the same question thereafter." It seems to me that it is fundamental to the order that the court made on May 13, 1955, that this was a child of the marriage, otherwise the court would have had no jurisdiction to order maintenance. It is perfectly clear that the jurisdiction of the court is to make an order in respect of "custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings."

---

[3] [1939] A.C. 1; 55 T.L.R. 260; [1938] 4 All E.R. 747.

[4] [1934] P. 162; 50 T.L.R. 441.

[5] [1928] P. 169; 44 T.L.R. 495.

[6] [1954] P. 48; [1953] 2 All E.R. 1013.

[7] [1934] P. 162.

[1] [1939] A.C. 1.

I have been referred to other cases. A decision of my own in *Watson* v. *Watson*,[3] where the question of estoppel was raised and I ruled against estoppel because in that case there had never been any order for custody. All that had happened was that the husband, who was the petitioner for divorce, alleged that there was a child born of whom he did not admit the paternity. Not unnaturally, he did not ask for custody, and no order for custody was made. Also, not unnaturally, the wife ignored it. It was not an issue in the case at all. But it was a very different proposition in *Lindsay* v. *Lindsay*,[4] which was a decision of Sir Boyd Merriman P. The headnote reads: ". . . A petition for maintenance, though a proceeding distinct from a petition for dissolution, can nevertheless be proceeded with only as incidental to a petition for dissolution, and when the paternity of a child has not been disputed and has been established by a substantive order for its custody in a decree nisi, the paternity becomes res judicata and cannot be assailed in maintenance proceedings which follow. . . ." In the course of his judgment Sir Boyd Merriman P. referred to what was the corresponding section to section 26 (1) of the 1950 Act (which was then section 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, and said[5]: "Section 193 (1) lays down that in any proceedings for divorce the court may make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the

---

[2] [1939] A.C. 1, 43.

[3] [1954] P. 48.

[4] [1934] P. 162.

[5] [1934] P. 162, 168.

"subject of the proceedings; and that it may do so from time to "time, either before or by, or after the final decree. It thus "appears that the jurisdiction of the court both with regard to "custody and maintenance of children is limited to children the "marriage of whose parents is the subject of the proceedings."

The present case really seems to me to be completely covered by Sir Boyd Merriman P.'s decision in *Lindsay* v. *Lindsay*.[6] In *Lindsay* v. *Lindsay*[6] there was a substantive order for custody which the court would not have jurisdiction to make unless the parents of the child were the parents whose marriage was the subject of the decree. In this case an order for the maintenance of the child has been made, and the court likewise would not have had any jurisdiction to make it unless the parents of that child were the parents whose marriage was the subject of the decree. If the husband had really wanted to raise this issue, the time for him to raise it in this case would have been when the wife asked for maintenance for herself and for the child of the marriage. He not only did not raise it then, but in his affidavit he said that he was ready to continue the maintenance "to my daughter."

It has been suggested that he was in ignorance of the law and his rights, and that I ought to read that passage with reference to the order made in the justices' court some three years earlier. I do not think that I can do that. It would have been very easy for him to have said: "I am ready to go on paying "for the child" without referring to it as "my daughter."

The crux of the whole case is this: an order for maintenance has been made under section 26 of the Matrimonial Causes Act, 1950, and that estops the husband from now saying that the child is not the child of the marriage. I therefore decide this issue in favour of the wife petitioner who is the defendant to the issue, and will make a declaration that the plaintiff is the father of the child.

Declaration of paternity accordingly.

J. B. G.

The husband appealed.

B. J. M. MacKenna Q.C. and *F. Maurice Drake* for the husband. The first condition to be satisfied to establish estoppel per rem judicatam, namely, that the same issue shall have previously been before a court of competent jurisdiction, has not been satisfied here, for the registrar was not a court of competent jurisdiction to try the issue as to paternity. The jurisdiction to make maintenance orders under section 26 (1) of the Matrimonial Causes Act, 1950, depends on whether the child is or is not a child of the marriage; and rules 27 and 29 (1) of the Matrimonial Causes Rules, 1950, lay down that that issue must be tried by a judge, and not by the registrar. Thus the issue of paternity here has never been determined by a court of competent jurisdiction, and accordingly the husband is not estopped per rem judicatam from having that issue tried: see *Langmead* v. *Maple*,[1] *per* Willes J., followed by Roche J. in *Eastwood and Holt* v. *Studer*.[2]

---

[6] [1934] P. 162.

Alternatively, the registrar here made an order assuming jurisdiction but did not make any finding of fact as to paternity which would found the jurisdiction. If he purported to decide the question of paternity his decision on that question was one which was only incidentally cognizable and accordingly does not create an estoppel. He was in the position of the magistrate in *Attorney-General for Trinidad and Tobago* v. *Eriché*,[3] or of the justices in *Reg.* v. *Hutchings*,[4] who were held not to be courts of competent jurisdiction to decide the question of title or whether the road was a public highway. *Lindsay* v. *Lindsay*,[5] which Barnard J. held covered the present case, is distinguishable, for in that case the order relied on as creating estoppel was a decree nisi which gave custody of the child of the marriage to the mother and was made by the trial judge, who had complete jurisdiction to make it; and the question of paternity was not one incidentally cognizable by him but was one within his certain jurisdiction. Here there was no prayer for custody in the wife's petition and no order for custody was made by the court which granted her the decree of divorce.

The second condition to be satisfied to create estoppel is that the issue shall have been controverted in the previous proceedings: see *per* Baron Parke in *Boileau* v. *Rutlin*,[6] that a person is estopped if he has directly or indirectly admitted a material fact. Here the husband can rely on his denial of paternity before the registrar.

The third condition to be satisfied is that the matter in issue shall have been finally decided. Though it is conceded that on

[1] (1865) 18 C.B.N.S. 255, 270.
[2] (1926) 31 Com.Cas. 251.
[3] [1893] A.C. 518.
[4] (1881) 6 Q.B.D. 300.
[5] [1934] P. 162; 50 T.L.R. 441.
[6] (1848) 2 Exch. 665, 681.

authorities in the House of Lords—*New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[7] and *Hoystead* v. *Commissioners of Taxation*[8]—the principle of estoppel extends to any point of substance which formed the ratio of, or was fundamental to, the previous decision, an interlocutory order for maintenance is not an order which has the necessary requisite of finality: see Spencer Bower on Res Judicata (1924 ed.), p. 91, on "Finality," para. 143 at p. 92. Such orders remain subject to the control of the court which made them and do not create estoppel for the purpose of res judicata: *Nouvion* v. *Freeman*[9] and *Robins* v. *Robins*.[10]

John Elton for the wife. As the legitimacy of a child was here in issue the preliminary point as to estoppel was pleaded; but if there is no substance in that plea the wife would not ask for the issue to be tried but, in view of the history of the marriage and the husband's acceptance of this child as his own, would seek her remedy by asking for more maintenance.

It is nevertheless submitted that the registrar has the necessary jurisdiction, for he has authority to determine matters of maintenance in relation to a child of the marriage, and one of the fundamental requirements for the exercise of that authority must be the proof or assumption that the child is a child of the marriage.

[HODSON L.J. What authority has a registrar to try the issue as to paternity? *Evans* v. *Evans and Blyth*[11] appears to be an exact parallel to this case; in that case Gorell Barnes J. made an order, on a petition for variation of a marriage settlement, that an issue should be tried to determine the status of a child.]

It is conceded that the current practice is that issues of this kind shall be tried by a judge. But here the husband, having raised the issue and had it adjudicated against him, not only failed to appeal from that order but complied with it, and only asked for variation of the amount owing to his financial circumstances.

[HODSON L.J. He cannot confer jurisdiction on the registrar by failing to appeal from him or complying with the order made. He cannot make good what is bad.]

If a registrar is not competent to determine the issue, the practical difficulty may be that a husband may come to the court at any time—maybe years later—and say "This issue has "never been determined by a court of competent jurisdiction."

---

[7] [1939] A.C. 1, 42–43.
[8] [1926] A.C. 155, 170.
[9] (1889) 15 App.Cas. 1.
[10] [1907] 2 K.B. 13; 23 T.L.R. 428.
[11] [1904] P. 274; 20 T.L.R. 516.

[Hodson L.J. The court might then say that he was too late. But not every husband would be armed with a letter from his wife admitting that the child was not his.]

Unless the registrar is by rule or practice precluded from determining the fundamental basis on which he has to decide whether to grant maintenance or not, it must be assumed that he is empowered by the court to determine that the children are children of the marriage. The determination of that question is inherent in decisions made by registrars every day.

[Hodson L.J. The determination of the legitimation of a child, like the determination of custody of children, is never delegated by a judge. The terms of rule 29 (1) are really conclusive on this matter.]

Hodson L.J. stated the facts as set out above and continued: The order of the registrar made on May 13, 1955, involves, to my mind, a declaration that the child in question was a child of the marriage; and the first point taken by Mr. MacKenna on behalf of the husband is that the registrar had no jurisdiction to make such an order, and, accordingly, that there can be no estoppel.

That statement was made in accordance with well-recognized principles governing res judicata. I take the principle from the judgment of Willes J. in *Langmead* v. *Maple*[1] when he said: "I apprehend that if the same matter or cause of action has "already been finally adjudicated on between the parties by a "court of competent jurisdiction, the plaintiff has lost his right "to put it in suit either before that or any other court." I propose to confine my judgment to this point.

The question of custody and legitimation of children is a matter which is dealt with by the judges and not by the registrars. That has been the established practice over a period of years, and the matter is, I think, substantially covered by the Matrimonial Causes Rules, 1950. The Act of Parliament in question, now the Matrimonial Causes Act, 1950, by section 26 (1), provides: "In any proceedings for divorce or nullity of marriage or judicial "separation, the court may from time to time, either before or "by or after the final decree, make such provision as appears "just with respect to the custody, maintenance and education of

---

[1] (1865) 18 C.B.N.S. 255, 270.

"the children the marriage of whose parents is the subject of the "proceedings, . . ." If this child was not a child of the marriage of these persons, there was no jurisdiction to make an order for maintenance. So far as the Rules are concerned, the relevant rules are: r. 27: "An application for directions for the separate "trial of any issue or, except in a case to which rule 14 (2) "applies,"—to which I need not refer—"of any question as to "the jurisdiction of the court shall be made to a judge"; and r. 29 (1): "Unless otherwise directed, all causes or issues shall "be tried by a judge alone."

The issue whether or not this child was a child of the marriage has never been determined by a judge, although the order of Davies J. was a direction to that effect. If it can be said that by the form of the order which Mr. Registrar Townley Millers made he was determining the issue as to the paternity of this child and determining that the child was a child of the petitioner and respondent in this case, then, in my judgment, there is no doubt that the registrar had no jurisdiction so to do. Barnard J., in his judgment, after referring to the general law of estoppel, did purport to follow a decision of Sir Boyd Merriman P. in *Lindsay* v. *Lindsay*[2]; but that was a very different case. There was a petition there for divorce in which there was a prayer for custody, and the order was made at the same time as the decree nisi was made, giving to the wife, the petitioner in that case, the custody of the child. That was tantamount to a declaration by the judge that that child was a child of the marriage.

When one compares the petition in this case, one sees that although the fact of the birth of the child was recited, there was no prayer for custody in the petition, and neither at the hearing nor, indeed, at any time was there a declaration that the child was a child of the marriage, no order for custody being made in favour of the mother or any other person. That case, therefore, is clearly distinguishable and in a vital matter, because the President was clearly founding himself on the fact that a judge's order had been made dealing with the very question with which he was concerned. That situation does not arise here, and the consequence is that, in my judgment, this appeal should be allowed.

In order to avoid further litigation, I understand that counsel for the wife, having considered the matter, is prepared to submit to the claim for maintenance in respect of this child being dismissed, retaining his right to apply, if he can, for maintenance for the wife to be allotted to her, taking into consideration the circumstances to which I have referred in which the appellant married the mother-to-be of the child knowing all the facts and making the child in all but blood, apart from any question of adoption, a member of his own family.

---

[2] [1934] P. 162; 50 T.L.R. 441.

In my opinion the appeal should be allowed.

PARKER L.J. I have come to the same conclusion. Before the jurisdiction of the court can be excluded on the ground of res judicata a number of conditions must be fulfilled. First and foremost—and, indeed, it is the only one necessary to refer to in this case—the same matter must have come into question already and been decided by a court of competent jurisdiction. Accordingly, the real question here is whether the registrar was a court of competent jurisdiction to decide this issue of paternity. I think that if one reads section 26 alone, it would appear that a registrar has jurisdiction to decide the question of fact which alone will enable him to exercise the powers under that section, namely, whether the child is a child of the marriage. Pausing there, therefore, there would be jurisdiction in the registrar, and if he wrongly found the facts, the matter could be corrected on appeal. But the matter does not rest there, because rr. 27 and 29, to which my Lord has referred, provide that if any question is raised as to the jurisdiction of the court, application for a separate trial of an issue should be made to the judge and the judge shall determine that issue. That, indeed, was the procedure adopted in this case by Davies J. It seems to me quite clear from those rules that the issue of paternity is one for the judge and not for the registrar.

The judge treated himself as bound by the President's decision in *Lindsay* v. *Lindsay*[3]; he said[4]: "The present case "really seems to me to be completely covered by Sir Boyd "Merriman P.'s decision in *Lindsay* v. *Lindsay*.[5] In *Lindsay* "v. *Lindsay* there was a substantive order for custody which the "court would not have jurisdiction to make unless the parents of "the child were the parents whose marriage was the subject of the "decree."

It seems to me, however, that there is a very real difference, because whereas in *Lindsay* v. *Lindsay*[5] the order relied on, namely, the order for custody and the decree nisi, was clearly

---

[3] [1934] P. 162.

[4] Ante 218.

[5] [1934] P. 162.

C. A.
1957

Nokes
v.
Nokes.

made by a court of competent jurisdiction, in this case, if I am right, the registrar had no jurisdiction to determine the issue. On that ground I would allow this appeal.

Ormerod L.J. I agree, and there is nothing I wish to add.

Appeal allowed.
Issue decided in favour of the appellant.
Application for maintenance, so far as it related to the child, dismissed.

Solicitors: *Ashley, Tee & Sons; Drysdale, Lamb & Jackson.*

M. M. H.

1957
Mar. 21, 22;
May 21;
June 5.

Lord Merriman
P.

REDERI A/S NORSEMAN AND REDERI A/S NORSE LADY *v.* BRITISH TRANSPORT COMMISSION.
THE NORSEMAN.

[1954 N. No. 62.]

Practice—Payment into court—Tax deduction—Party entitled or obliged to deduct tax on interest of claim—Whether payment made with deduction of tax.

Admiralty—Interest on damages—Tax deduction—Whether interest on claim is "interest of money"—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 169, 170—*Law Reform (Miscellaneous Provisions) Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 3 (1).

Revenue—Income tax—"Interest of money."

Where a party makes a payment into court in satisfaction of a claim and is entitled or obliged to deduct the income tax payable on the interest accrued on such claim, the payment in will be taken to be made without deduction of tax, unless it is made clear that the payment in is the residue after tax on the interest has been deducted.

Taylor v. *Taylor* [1938] 1 K.B. 320; 53 T.L.R. 942; [1937] 3 All E.R. 571, *Hemsworth* v. *Hemsworth* [1946] K.B. 431; 62 T.L.R. 329; [1946] 2 All E.R. 117, and *Johnson* v. *Johnson* [1946] P. 205; 62 T.L.R. 333; [1946] 1 All E.R. 573 applied.

Per curiam. Interest awarded in the Admiralty Court is similar to that awarded under section 3 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934,[1] and is "interest of money" within the meaning of sections 169 and 170[2] of the Income Tax Act, 1952.

---

[1] Law Reform (Miscellaneous Provisions) Act, 1934, s. 3: "(1) In any "proceedings tried in any court of "record for the recovery of any debt "or damages, the court may, if it "thinks fit, order that there shall be "included in the sum for which judg-"ment is given interest at such rate

Riches v. *Westminster Bank Ltd.* [1947] A.C. 390; 63 T.L.R. 211; [1947] 1 All E.R. 469 and *The Northumbria* (1869) L.R. 3 A. & E. 6 applied.

The Joannis Vatis (*No. 2*) [1922] P. 213; 38 T.L.R. 566 distinguished.

MOTION and CROSS-MOTION in objection to the registrar's report.

On October 13, 1952, the plaintiffs' vessel *Norseman*, while moored in the Old Harbour, Hartlepool, broke adrift and grounded, sustaining damage. The plaintiffs commenced an action against the defendants, the harbour authority, who admitted liability, and the damages were referred to the Admiralty Registrar.

By a letter, dated February 15, 1955, the defendants offered the sum of £900 to the plaintiffs, and, on the offer being refused, paid this sum into court. The registrar held that the plaintiffs were entitled to recover £852 19s. 5d., in respect of damages, and interest, amounting to £68 3s. 4d., making a total sum of £921 2s. 9d.

The registrar reserved his decision on the question of costs, and, after hearing argument on this question, held that there was

" as it thinks fit on the whole or any " part of the debt or damages for the " whole or any part of the " period between the date when the " cause of action arose and the date " of the judgment:"

[2] Income Tax Act, 1952, s. 169: " (1) Where any yearly interest of " money, annuity or other annual pay- " ment is payable wholly out of profits " or gains brought into charge to " tax—(*a*) no assessment shall be " made on the person entitled to the " interest, annuity or annual payment; " and (*b*) the whole of the profits or " gains shall be assessed and charged " with tax on the person liable to the " interest, annuity or annual payment, " without distinguishing the interest, " annuity or annual payment; and " (*c*) the person liable to make the " payment, whether out of the profits " or gains charged with tax or out of " any annual payment liable to deduc- " tion, or from which a deduction has " been made, shall be entitled, on " making the payment, to deduct and " retain out of it a sum representing " the amount of the tax thereon at the " standard rate for the year in which " the amount payable becomes due; " and (*d*) the person to whom the " payment is made shall allow the " deduction on receipt of the residue " of the payment, and the person " making the deduction shall be " acquitted and discharged of so much " money as is represented by the " deduction, as if that sum had been " actually paid."

S. 170: " (1) Where—(*a*) any " interest of money, annuity or other " annual payment charged with tax " under Schedule D; or (*b*) any " royalty . . . is not payable or not " wholly payable out of profits or " gains brought into charge, the " person by or through whom any " payment thereof is made shall, on " making the payment, deduct out of " it a sum representing the amount of " the tax thereon at the standard rate " in force at the time of payment."

no distinction between interest awarded by the Admiralty Registrar in the exercise of his discretionary power, and that awarded in exercise of the power conferred by the Law Reform (Miscellaneous Provisions) Act, 1934, and such interest was taxable income. The possibility of a deduction of tax ought to have been apparent to the plaintiffs' solicitors, and on the authority of *Riches* v. *Westminster Bank Ltd.*,[3] the defendants had paid in a sum which satisfied the plaintiffs' claim. The registrar ordered that the defendants pay the plaintiffs' costs, to be taxed or agreed, up to and including February 15, 1955, and half of the plaintiffs' taxed or agreed costs incurred thereafter.

The plaintiffs moved that the decision of the registrar be set aside or varied, on the grounds that the registrar failed to allow interest up to the date of his report or until payment of the amount due from the defendants, and failed to allow the plaintiffs the whole of their costs, incurred after February 15, 1955, and wrongly found that the defendants were entitled to deduct income tax on the interest awarded.

The defendants moved that the decision of the registrar that the plaintiffs were entitled to half their taxed or agreed costs after February 15, 1955, be set aside or varied, and that the defendants recover from the plaintiffs the whole of their taxed or agreed costs from February 15, 1955, on the grounds that, on the basis of fact as found by the registrar that on that date the defendants had offered a sum, which would have satisfied the plaintiffs' claim, the registrar wrongly exercised his discretion in ordering the defendants to pay one-half of the plaintiffs' taxed or agreed costs after February 15, 1955.

P. T. Bucknill for the plaintiffs. Interest awarded in the Admiralty Court is included in the claim: *The Joannis Vatis (No. 2)*.[4] Any sum so awarded is not "interest of money" within the meaning of sections 169 and 170 of the Income Tax Act, 1952. Damages awarded in the Admiralty Court are different from those awarded on a debt as in *Riches* v. *Westminster Bank Ltd.*,[5] where the interest was not part of the claim. The Law Reform (Miscellaneous Provisions) Act, 1934, supplemented the power of the Admiralty Court but in no way interfered with the original jurisdiction to award interest as part of the claim for damages. In substance, the interest awarded by the registrar was in the nature of capital and is not subject to tax. Accordingly, the registrar misdirected himself by considering questions of the deductibility of tax when deciding the question of costs. If the defendants are not entitled to deduct tax on the payment in, then the plaintiffs have never been offered a sum sufficient to exceed that awarded them.

---

[3] [1947] A.C. 390; 63 T.L.R. 211; [1947] 1 All E.R. 469.

[4] [1922] P. 213; 38 T.L.R. 566

[5] [1947] A.C. 390; 63 T.L.R. 211; [1947] 1 All E.R. 469.

If the true position is that the defendants are entitled to deduct tax on the interest awarded on the claim, they should have clearly stated that their offer was made on the basis that tax had been deducted from the interest.

Since the last adjournment it now appears from correspondence, which the plaintiffs have had with the Inland Revenue Authorities, that, by reason of double taxation relief between this country and Norway, the defendants were not entitled to deduct any tax from the sum awarded as interest, even if such sum is "interest of money" within sections 169 and 170 of the Income Tax Act, 1952.

It is submitted that the registrar misdirected himself in not allowing the plaintiffs their costs in full or interest after the offer made, and that this appeal should be allowed.

[Konstam, The Law of Income Tax, 10th ed., pp. 182–185; *Inland Revenue Commissioners* v. *Ballantine* [6]; *Simpson* v. *Executors of Bonner Maurice* [7]; *In re National Bank of Wales Ltd.* [8]; *The Kong Magnus* [9]; *The Berwickshire* [10]; *The Dundee* [11] and *The Northumbria* [12] were also referred to.]

S. Knox Cunningham for the defendants. Interest award in the Admiralty Court is in the nature of income and is subject to tax: *The Northumbria* [13]; *Riches* v. *Westminster Bank Ltd.* [14] If the defendants are entitled to deduct tax on the interest included in the claim, then the plaintiffs have been offered a sum which exceeds that awarded, and the registrar should have awarded the defendants all their costs after the offer was made: *Findlay* v. *Railway Executive.* [15] If it now appears that the plaintiffs do not have to pay tax, this should have been established earlier in the hearing, and the fact that this was not so established is a factor to be considered with regard to the costs of this appeal.

---

[6] (1924) 8 T.C. 595.

[7] (1929) 14 T.C. 580.

[8] [1899] 2 Ch. 629; 15 T.L.R. 88, 517.

[9] [1891] P. 223.

[10] [1950] P. 204; 66 T.L.R. (Pt. 1) 568; [1950] 1 All E.R. 699.

[11] (1827) 2 Hagg.Adm. 137.

[12] (1869) L.R. 3 A. & E. 6.

[13] Ibid.

[14] [1947] A.C. 390.

[15] [1950] W.N. 570; 66 T.L.R. (Pt. 2) 836; [1950] 2 All E.R. 969.

As to the argument that the defendants should have stated that their offer was on the basis that tax had been deducted from the interest on the claim, a party must be presumed to know the law and the possibility of a deduction of tax should have been apparent to the plaintiffs.

This appeal should be allowed and the defendants awarded all their costs after the offer was made.

P. T. Bucknill replied.

Cur. adv. vult.

June 5. LORD MERRIMAN P. This appeal from the Admiralty Registrar concerns the sufficiency of a payment into court by the defendants to satisfy the principal sum of damages and interest thereon in respect of a casualty sustained by the plaintiffs' M/V *Norseman*, for which the defendants were admittedly liable. The point at issue relates to the deductibility of British income tax upon the interest payable.

On October 13, 1952, the M/V *Norseman*, a Norwegian vessel registered at Oslo, and owned by Norwegian nationals, lying in West Hartlepool Old Harbour, in severe weather carried away her ground moorings and took ground in the southern part of the harbour.

In an action by the ship against the British Transport Commission the defendants filed an admission of negligence and, through counsel, on a summons heard on April 9, 1954, admitted that the vessel had suffered some damage.

The particulars of the damages claimed amounted to £1,772 5s. 1d. plus interest from February 25, 1953, to the date of payment. It has been common ground throughout that the interest would run from the date mentioned, this being the date of the payment of the repair bill, and that it would be at the rate of 4 per cent. on the principal sum awarded.

The registrar having disallowed the chief item of £430 for deferred repairs, and making considerable reductions in the other items, awarded the principal sum of £852 19s. 5d. The detail is irrelevant as there is no appeal about quantum. The whole of the first day's hearing having been occupied in the determination of the amount of the claim, the registrar adjourned to another day the question of interest and costs.

The defendants had paid into court the sum of £900. The registrar, of course, was unaware of this fact when he made his award, and there is a conflict of recollection about whether the details contained in letters in the agreed bundle which are marked "without prejudice" were before him on the later occasion. However that may be, the privilege was waived before me, and I was invited by both counsel to consider the letters. Suffice it to say that the round sum of £900 was clearly tendered in an attempt to buy peace, and the only particulars given were that it included a principal sum of £733 8s. 8d. as being the total estimated by the defendants to be due under the various heads of claim together with interest on that sum for two years quantified in the gross sum of £58 13s. 6d. The plaintiffs complain that there was no intimation that the specific sum included as interest in the sum offered in satisfaction was offered subject to the deduction of tax payable thereon.

The registrar ruled that there was no obligation on the defendants to notify this fact. I will recur to this point later.

The position on the final hearing before the registrar was as follows: If the plaintiffs were entitled to recover the interest up to the date of the offer and the consequent payment into court at 4 per cent. without any deduction in respect of tax they would have recovered £921 2s. 9d.; namely, £852 19s. 5d. in respect of damages, together with interest thereon £68 3s. 4d.: and the payment into court of £900 would therefore be insufficient in any event.

On the other hand, on the assumption that the interest claimed is "interest of money" within the meaning of the Income Tax Act, 1952—with which I will deal separately—it is argued that in paying the interest the defendants were either entitled or obliged to deduct the tax under the provisions of one or other of sections 169 or 170 of the Income Tax Act, 1952, which replaced rules 19 and 21 of the All Schedule Rules in the Act of 1918.

It was admitted as a matter of fact that the defendants would pay the interest out of moneys which were not brought into charge to tax, with the result that section 170 would apply, whereby they would be bound to deduct tax at the standard rate, and to account to the Inland Revenue forthwith for the amount deducted. The amount of this tax was stated to be about £26; but the precise amount is immaterial. The contention is that, after deducting the tax from the interest, the plaintiffs would only recover between £890 and £900, so that the £900 paid into court would, it is argued, be more than sufficient to satisfy the plaintiffs' claim, with the usual consequences. It is important, however, to note that in fact no such deduction and account has been made at all. The result contended for is purely notional.

The questions are: whether the interest on the damages is "interest of money" within the meaning of the Income Tax Act, 1952; and, if so, what is the effect on the payment into court of the alleged deductibility of tax on payment of the interest.

Since it is now clear, as will be seen later, that the tax is not deductible at all on this particular interest, I am conscious that these questions have become academic. But, as the argument upon them occupied by far the greater part of the hearing, I feel that I ought to express my opinion upon them, if only because of the effect on costs.

The defendants submitted that the interest upon the damages was "interest of money" within the meaning of the Income Tax Act, 1952.

The registrar gave effect to this submission, holding that the case was covered by the decision of the House of Lords in *Riches* v. *Westminster Bank Ltd.*[1] The material part of the headnote reads as follows: "A sum of money awarded under the "powers conferred by section 3 (1) of the Law Reform (Miscel-"laneous Provisions) Act, 1934, as interest and included in the "total sum for which judgment is given is 'interest of money' "within the meaning of Schedule D, of the Income Tax Act, 1918, "so that the judgment debtor, when paying the judgment debt, is "entitled to deduct income tax on the amount of the award of "interest and the judgment creditor must 'allow such deduction' "on receipt of the balance."

Mr. Bucknill disputed this ruling, on the ground that the decision did not apply to the interest awarded in the Admiralty Court. He agreed that the Act of 1934 applied to Admiralty cases, but contended that the Act did not alter or curtail the principles upon which the Admiralty Court had long acted in awarding interest. In other words, he said that the jurisdiction under the Act of 1934 was merely supplementary to that which had long been established in the Admiralty Court, and was expressly preserved by section 1 (1) of the Administration of Justice Act, 1956. For a statement of the nature of the rule he relied on a passage in the judgment of Sir Henry Duke P. in *The Joannis Vatis (No. 2)*[2]: "In this jurisdiction a rule exists "with regard to interest upon damages which is well established "and proper to be taken into account. The registrar and "merchants include in their computation of damage by collision

---

[1] [1947] A.C. 390; 63 T.L.R. 211; [1947] 1 All E.R. 469.

[2] [1922] P. 213, 223; 38 T.L.R. 566.

"interest upon the items of claim from the time of accrual of "the damage until the date of the assessment."

He relied in particular on the interest being "included in their "computation of damage," but it is to be observed that in the preceding sentence Sir Henry Duke referred to the existence of a rule "with regard to interest upon damages."

In my opinion the origin and nature of the rule is nowhere better stated than by Sir Robert Phillimore in *The Northumbria*,[3] the headnote in which reads: "The owners of a ship claiming in "the Court of Admiralty to have their liability limited, in respect "of damages occasioned by collision, to an aggregate amount not "exceeding £8 for each ton of the ship's tonnage, are liable to "pay interest on such aggregate amount from the date of the "collision."

The contention of the owners of the wrong-doing vessel being that the addition of interest to the amount limited would necessarily infringe the Act of Parliament whereby liability was limited to the sum of £8 per ton, it was manifestly necessary to lay down the principle upon which interest upon damages is allowed in Admiralty. Sir Robert Phillimore, after referring to certain authorities relating to the common law, said[4]: "But it appears "to me quite a sufficient answer to these authorities to say, that "the Admiralty, in the exercise of an equitable jurisdiction, has "proceeded upon another and a different principle from that on "which the common law authorities appear to be founded. The "principle adopted by the Admiralty Court has been that of the "civil law, that interest was always due to the obligee when "payment was not made, ex mora of the obligor; and that, "whether the obligation arose ex contractu or ex delicto."

I do not think that Sir Henry Duke in *The Joannis Vatis (No. 2)*[5] was saying anything inconsistent with the fuller statement of the rule by Sir Robert Phillimore.

I do not think it is necessary to go very fully into the decision of the House of Lords in *Riches* v. *Westminster Bank Ltd.*[6]

With reference to the contention that the additional sum, though awarded under a power to add interest to the amount of the debt, and though called interest in the judgment, was not really interest such as attracted income tax, but was damages, Lord Simon said[7]: "The short answer to this is that there is no "essential incompatibility between the two conceptions. The

---

[3] (1869) L.R. 3 A. & E. 6.
[4] Ibid. 10.
[5] [1922] P. 213.
[6] [1947] A.C. 390.
[7] Ibid. 396.

"real question, for the purpose of deciding whether the Income "Tax Acts apply, is whether the added sum is capital or income, "not whether the sum is damages or interest." Later he said [8]: "The added amount may be regarded as given to meet the injury "suffered through not getting payment of the lump sum "promptly, but that does not alter the fact that what is added "is interest." And again: "If damages are increased by adding "interest upon a principal sum, that does not prove that such "interest is not liable to tax." And in conclusion, he likened the interest to the accumulated fruit of a tree which the tree produces regularly until payment.

Lord Wright [9] also rejected the contention that money awarded as damages for the detention of money is not interest and has not the quality of interest. Again, after a reference to the common law as it stood before Lord Tenterden's Act, Lord Wright said [10]: ". . . a common law court in awarding damages "was not entitled to award interest in addition in the absence of "express or implied contract or statute. The Admiralty Court "however claimed and exercised that right. The court of equity "also when making a money decree held itself entitled to award "interest for the period between the time when the money was "due and the date of the decree when it thought that proper "in order to effect a restitutio in integrum." He said [11] that in his opinion there was no incompatibility in connexion with the Act which charges "all interest of money" between interest proper and interest by way of damages. And, after distinguishing cases in which payments on capital account were estimated in terms of interest, he said [12] that the relevant distinction between capital and income depends on substance and not on the mere name.

Lord Simonds said [13]: "Here the argument is that, call it "interest or what you will, it is damages, and, if it is damages, "then it is not 'interest in the proper sense' or 'interest "'proper,' expressions heard many times by your Lordships. "This argument appears to me fallacious. It assumes an incompatibility between the ideas of interest and damages for which "I see no justification." Lord Simonds expressed [14] his concurrence in what Lord Normand was about to say about the cases decided by the Court of Session.

---

[8] [1947] A.C. 390, 397.
[9] Ibid. 398.
[10] Ibid. 400.
[11] Ibid. 402.
[12] Ibid. 403.
[13] Ibid. 406.
[14] Ibid. 411.

Lord Normand in turn agreed with Lord Simonds' opinion. After saying that the interest awarded is sometimes spoken of as damages both in England and Scotland, Lord Normand said [15]: "But in Scotland at least it would, I think, be more appropriately "described as compensation. This matter of terminology is, "however, of no great importance, for the liability of a payment "to income tax does not depend on whether or not it is a payment "of damages, but on whether or not it is received as income." In conclusion he said [16]: "But while there may be difficulty in "deciding in particular cases whether a payment described and "calculated as interest is not in truth a capital payment, it is "now settled that interest awarded ex mora, whether it is to be "regarded as damages or not, is income of the creditor." Thus we are back again at what Sir Robert Phillimore said about interest in Admiralty actions in *The Northumbria*.[17] In my opinion the registrar was perfectly correct in deciding that as regards the question of interest there is no distinction between this case and *Riches* v. *Westminster Bank Ltd.*[18] I now return to the question of the deductibility of tax on the interest, and the supposed effect on the sufficiency of the payment into court.

In *Allchin* v. *Coulthard* [19] the scheme of collection of Income Tax embodied in rules 19 and 21 was summarized as follows in the speech of Lord Simon, with which Lord Wright and Lord Russell of Killowen expressly concurred: "(*a*) A person liable to "pay any yearly interest of money, annuity or any other annual "payment to a recipient is not entitled to deduct this payment "in arriving at his profits or gains to be assessed and charged "with income tax. If the amount is payable and paid out of "his profits or gains, he is assessed on a sum which includes such "payments, while the recipient is not directly assessed in respect "of the amount at all. Consequently, the Crown gets from the "payer both the tax at the standard rate which would otherwise "be due from the recipient of the annual payment and the tax "due from himself in respect of what is left of his profits and "gains after the payment is made. (*b*) If the annual payment "is payable and paid out of his profits and gains, the payer is "*entitled* to deduct from the payment he makes to the recipient "income tax at the current rate, and the recipient is bound to "allow the deduction on receipt of the residue and to treat the "payer as acquitted of liability to him in respect of the amount

---

[15] [1947] A.C. 390, 412.

[16] Ibid. 414.

[17] L.R. 3 A. & E. 6.

[18] [1947] A.C. 390.

[19] [1943] A.C. 607, 619; 59 T.L.R. 396; [1943] 2 All E.R. 352.

"thus deducted. By this means, the payer recoups himself for "the tax which he has paid or will pay on the annual payment. "(c) If and in so far as the annual payment is not payable and "paid out of profits or gains brought into charge, the person "making the payment is *bound* to deduct from it income tax "at the current rate and to account to the Crown for the amount "deducted. In effect, the payer in such a case acts as collector "for the Crown of the tax due from the recipient. The require- "ment that the recipient must allow the deduction and treat the "payer as acquitted of liability in respect of this amount is not "repeated in r. 21, but must be implied."

This summary applies with equal force to the corresponding provisions of sections 169 and 170 of the Income Tax Act, 1952, including, in my opinion, the implication of the requirement just mentioned, which appears in section 169 (1) (*d*) as follows: "(*d*) the person to whom the payment is made shall allow the "deduction on receipt of the residue of the payment, and the "person making the deduction shall be acquitted and discharged "of so much money as is represented by the deduction, as if that "sum had been actually paid." The wording is almost identical and the substance is the same as the corresponding provision in rule 19.

Seeing then, that the payer is discharged as if the sum deducted had actually been paid, it would appear to follow that the payee must be taken to have received the whole, including the amount deducted. After all, the interest is the payee's income, and in spite of what Lord Simon truly called "the "scheme of collection," it is the tax due from the payee on that income that the payer collects and hands over to the Inland Revenue.

Moreover, it has been held—see *Taylor* v. *Taylor*,[20] *Hemsworth* v. *Hemsworth*[21] and *Johnson* v. *Johnson*[22]—that in order to exercise the right of deduction the payer must ascertain the amount of the deduction, and notify the payee of the deduction and pay him the residue. If he pays without any such notification the payer will be taken to have made the payment without deduction.

I see no reason why the same principle should not apply to a payment into court, in connexion with which it would be quite simple to make it clear that what was being paid into court in cash was the residue after deduction of tax on the interest. In this case it is clear that there was no notification on making the payment in of an intention to deduct tax. In fact, as is conceded, the suggestion that the deductibility of the tax on the interest came into the question had not then occurred to anybody. It was first mentioned at the second day's hearing before the registrar, when it was apparent that interest on the principal sum would make the total exceed the amount paid into court. I am unable, therefore, to agree with the registrar that the defendants were under no obligation to notify the deduction of tax.

---

[20] [1938] 1 K.B. 320; 53 T.L.R. 942; [1937] 3 All E.R. 571.

[21] [1946] K.B. 431; 62 T.L.R. 329; [1946] 2 All E.R. 117.

[22] [1946] P. 205; 62 T.L.R. 333; [1946] 1 All E.R. 573.

In the circumstances it is unnecessary to consider further the question whether, assuming the deduction of tax to be real and not notional, the plaintiffs would be deemed to have recovered not only the cash residue, but the total sum, including the tax. However this may be, it is now clear beyond doubt that no tax is deductible on this particular sum of interest. On the adjourned hearing of this appeal Mr. Bucknill produced two documents, dated May 13, 1957, and a covering letter from the office of the Inspector of Foreign Dividends of the same date. These documents, headed "United Kingdom Income Tax—Authority to pay "income without deduction of tax," are addressed to the defendants, and show that the interest of £68 3s. 4d. awarded as part damages in a claim before the Admiralty Court payable by the defendants should be paid to the plaintiffs without deduction of tax, it having been proved to the satisfaction of the Commissioners of Inland Revenue that they are entitled to exemption from United Kingdom income tax by reference to the arrangements made between the Government of the United Kingdom and the Government of Norway for the avoidance of double taxation.

As it is conceded that this authority to pay the interest without deduction of tax is conclusive, it is, I think, unnecessary to set out the chain of authority in detail. It is sufficient to say that this particular relief from double taxation depends originally on section 53 of the Finance (No. 2) Act, 1945, and certain statutory instruments—namely, 1946 No. 466, particularly paragraph 3 (2), and 1951 No. 1798, the effect of which is preserved by section 528 (2) of the Income Tax Act, 1952, notwithstanding the repeal of section 53 of the Act of 1945.

That being so, there is no longer any question of the notional satisfaction of the plaintiffs' claim by the payment into court. The basis of the defendants' case in this respect is now shown to be without foundation. Although Mr. Bucknill conceded that, if it had been held that the defendants had satisfied the claim by the payment into court, the plaintiffs would have been unable to recover any further interest thereafter, I am satisfied that he never admitted that the claim for interest should be limited to two years and that the plaintiffs have never abandoned their claim to further interest accruing after the failure of the defence. On the other hand, Mr. Bucknill did not press for an award of interest beyond the date of the final hearing before the registrar—namely, January 18, 1957. I think that, in the circumstances, that is the proper date to which interest should run, and I give judgment accordingly.

As to the costs, both sides appeal against the registrar's order. I am bound to say that I have been unable to understand why, having held the defendants to have succeeded in respect of their payment into court, the registrar ordered them to pay half the plaintiffs' costs after the date of the payment in. However that may be, I must deal with the costs on the footing that, in my judgment, the plaintiffs are in the right and the defendants in the wrong as regards the payment into court.

But there has been a certain amount of confusion on both sides. The point on which the defendants have failed was an afterthought, which, as I have said, had no relation to the calculations on which the payment into court was based. Admittedly the point took the plaintiffs by surprise; but it is their business to know their own position in relation to United Kingdom taxation. If they could not put it correctly before the registrar, if necessary by an adjournment for the purpose, they should certainly have been ready to deal with it much earlier in the appeal. Moreover, as I have already indicated, the unsuccessful attempt to distinguish *Riches* v. *Westminster Bank Ltd.*[23] occupied a great deal of the hearing.

In all the circumstances, I think the plaintiffs should recover two-thirds of their taxed costs here and below.

Report of registrar varied.

Solicitors: *Hedley & Thompson; M. H. B. Gilmour.*

A. S-R.

---

[23] [1947] A.C. 390.

ARNOLD *v.* ARNOLD.

1957
Jan. 11, 24.

Mr. Commissioner Latey Q.C.

Husband and Wife—Divorce—Conflict of jurisdiction—Foreign decree based on residence—Validity—Parties domiciled in England at time of decree—Husband's desertion of wife while resident in Finland—Parties then domiciled in Finland—Principle of comity —Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 18 (1) (*a*) *and* (*b*).

Conflict of Laws — Jurisdiction — Divorce — Comity — Recognition of foreign divorces—Wife's decree—Parties domiciled in England.

A husband, whose domicile of origin was English, married in England in 1922 a wife who had come here temporarily from Finland and who accepted British nationality on marriage. Shortly afterwards they went to Finland and acquired a domicile of choice in that country, where the parties established their matrimonial home although remaining British subjects. In 1930 the husband left the wife and their two children and returned to England where he reverted to his English domicile; cohabitation was never resumed. The wife retained her British nationality, but continued to reside in Finland.

In March, 1940, the Court of Appeal at Abo, Finland, reversing a decree of a municipal court based on failure to adduce proper evidence, held that the husband had wilfully and without valid cause deserted the wife in 1930. Founding its jurisdiction upon a Finnish law of 1929 whereby proceedings for divorce could be commenced if the parties had last lived together in Finland, but the spouse who was defendant had deserted the other spouse, the Court of Appeal pronounced a divorce upon the ground of desertion for at least one year.

The husband did not learn of the divorce until the end of the war, although there had been a form of substituted service. In the meantime he had formed a liaison with another woman by whom he had had two children born after the divorce. He presented a petition for a declaration that the Finnish divorce was valid, and in the alternative for a divorce upon the ground of desertion, alleging, inter alia, an unreasonable refusal of the wife to join him in England:—

Held, that, (1) the decree was not invalidated by reason of the husband's ignorance of the proceedings, for the English court itself recognized the principle of service by advertisement, and the husband made no complaints of the absence of natural justice.

Igra v. *Igra* [1951] P. 404; [1951] 2 T.L.R. 670 followed.

(2) Looking to the realities the parties had not only last lived together in Finland when the husband was held to have deserted the wife, but were, in fact, then domiciled in Finland according to English law. The wife had moreover been continuously resident in that country for many years immediately preceding the divorce.

(3) In such circumstances it would be contrary to principle and inconsistent with comity if the courts of this country refused to recognize the jurisdiction of the Finnish courts to dissolve the marriage.

Travers v. *Holley* [1953] P. 246; [1953] 2 All E.R. 794 and *Carr* v. *Carr* [1955] 1 W.L.R. 422; [1955] 2 All E.R. 61 applied.

Dunne v. *Saban* [1955] P. 178; [1954] 3 All E.R. 586 and *Warden* v. *Warden*, 1951 S.L.T. 406 not followed.

(4) Since the Finnish court was competent, the validity of the decree was not negatived by reason of the fact that the ground was desertion for one year only.

Armitage v. *Attorney-General* [1906] P. 135, 141; 22 T.L.R. 306 and *Mezger* v. *Mezger* [1937] P. 19; 53 T.L.R. 18; [1936] 3 All E.R. 130 applied.

(5) A declaration should therefore be made that the marriage had been validly dissolved by the Finnish Court of Appeal.

Per curiam. The fact that only six weeks or sixty or ninety days' residence suffices in certain States to found jurisdiction seems to be beside the point if in fact there had been, say, two years' residence or more, or even less, and the residence is genuine and bona fide and not merely for the purpose of getting a divorce in a convenient court. The necessity laid down by statute in England for three years' residence, in the case of a wife whose husband is domiciled abroad, is probably due to the notion that our courts should not be used for the convenience of birds-of-passage, and that the court had to satisfy itself that the petitioning wife had chosen her home in England, though by operation of law her domicile was that of her husband domiciled abroad, and living either abroad or in England.

UNDEFENDED PETITION by husband for a declaration that his marriage had been validly dissolved in Finland by a decree granted to his wife in 1940 or, in the alternative, for a divorce on the ground of desertion, in the exercise of the court's discretion.

The husband, Frederick Norman Arnold, a British subject born and domiciled in England, married Elna Eugenia Alexandra Grefweberg, a Finnish national, in London in 1922. Later that year they went to Helsingfors, Finland, where the wife's family lived; and the husband acquired a domicile of choice in that country. Two children were born to them, in 1924 and 1926.

In 1930 the husband returned to England leaving his wife and children in Finland, and cohabitation was never resumed. The wife, however, retained her British nationality; and she had filed a certificate of residence upon her divorce proceedings from which it appeared that both parties were British subjects. Shortly after the husband returned to England he reverted to his English domicile of origin. In 1940 he began to live with another woman by whom he later had two children and whom he wished to marry.

On September 28, 1939, the municipal court at Helsingfors rejected a petition by the wife for divorce on the ground of desertion on the basis that insufficient evidence had been adduced in support; that judgment was set aside and a decree pronounced by the Court of Appeal at Abo, Finland, on March 15, 1940. Although there was a form of substituted service by local advertisement the husband did not learn of the proceedings until after the war. A representative was, however, appointed for him in the Finnish proceedings.

The finding of the Court of Appeal was as follows:—

"From the documents in the case the Court of Appeal has "gathered the following:—

"In answer to the summons issued by Nils Borje Wiklund "in his capacity [as 'representative provisionally appointed of "'the husband of Elna Eugenia Alexandra Arnold, Frederick "'Norman Arnold, Merchant, whose whereabouts are unknown, "'respondent in default'] on September 20, 1939, Elna Eugenia "Alexandra Arnold submitted in the Municipal Court that her "husband Frederick Norman Arnold, a British subject, who was "married to Elna Eugenia Alexandra Arnold on February 13, "1922, left the country in the year 1930 and since then had been "residing at an unknown place abroad, for which reason and since "Frederick Norman Arnold had thus arbitrarily and without valid "cause deserted Elna Eugenia Alexandra Arnold, the last-named "asked the Municipal Court to pronounce a divorce between the "Arnold spouses and to grant the custody of their infant children, "Wallace Alexander and Kenneth Alexander to Elna Eugenia "Alexandra Arnold; in addition Elna Eugenia Alexandra Arnold "stated that she proposed to continue to use the name Arnold.

"After Nils Borje Wiklund declared in evidence that he did "not oppose the aforesaid pleadings put in by Elna Eugenia "Alexandra Arnold, the Municipal Court since the appropriate "Public Prosecutor in the public interests had stated a ruling "made on September 28, 1939, in the matter, that no evidence "had been adduced to show that Frederick Norman Arnold wil"fully and without valid cause deserted Elna Eugenia Alexandra "Arnold, the court rejected the petition.

"Elna Eugenia Alexandra Arnold lodged an appeal against "the decision of the Municipal Court and asked that it be set "aside. Nils Borje Wiklund in his aforesaid capacity failed to "enter an appearance before the Court of Appeal.

"The Court of Appeal has considered the appeal and finds it "proved that Frederick Norman Arnold, who left the country "in 1930 and is residing at an unknown place abroad, wilfully "and without valid cause deserted Elna Eugenia Alexandra "Arnold, in relation to which the Court of Appeal, whilst setting "aside the judgment given by the court below in pursuance of "articles 76, 80 and 84 of the Marriage Law [the Finnish "Marriage Act, 1929], and articles 8 and 10 of the law relating "to certain family questions of an international character "[chapter 2 of the Act of December 5, 1929], considers it right "to pronounce a divorce between the Arnold spouses and to "entrust to Elna Eugenia Alexandra Arnold the custody of "the children of the spouses Wallace Alexander and Kenneth "Alexander and declares Elna Eugenia Alexandra Arnold entitled "to continue to bear the name of Arnold.

"This decision is subject to appeal to the Supreme Court. "A party who wishes to avail himself of that right must give "written notice thereof to the Court of Appeal by not later than "twelve o'clock on the thirty-first day hereafter, excluding this "day, and at the same time deposit an appeal fee of two hundred "marks. Any person who, through lack of means, wishes to "lodge an appeal before the Supreme Court, must also obtain a "certificate from a judge, priest . . . [etc.] . . . proving that he "is not in a position to deposit the appeal fee without depriving "himself and his family of the wherewithal for their maintenance. The parties are required to comply with the foregoing, "on pain of forfeiting the right of appeal against the judgment."

Article 76 of the Marriage Law of 1929 related to the grounds of divorce, the relevant ground being "desertion for at least one "year." * Article 80 provided for custody and article 84 for the right of a divorced wife to use the name of her former husband.

The Act of December 5, 1929, relating to certain family provisions of an international character, provided:—

Article 8: "(*a*) If both spouses, or one of them, are of a "foreign nationality, the proceedings for the annulment of the "marriage can be commenced only in that case that the defendant be domiciled in this country. (*b*) The aforesaid relates "even to proceedings for divorce. The proceedings for divorce

---

* The other grounds for divorce in the Finnish law of 1929 (which was still in force with certain amendments at the date of the hearing of this case) are adultery, sexual disease, cruelty, excessive intoxication and drug addiction, where one of the spouses had been sentenced to prison for a contemptible crime, where a spouse, during the marriage, has become insane and the insanity has lasted at least three years and there is no hope of recovery, separation during at least two years, and where a spouse has not heard anything of the other spouse for three years.

"can even be started if the spouses had last lived together † in "Finland, but the spouse who is defendant has deserted the "other spouse or has left the country after the grounds for the "divorce have appeared. (*c*) If in the country which nationality "a spouse holds, the right to dissolve a marriage of its citizens "is reserved only for authorities in that country, proceedings for "dissolving the marriage can be commenced in Finland only on "condition that there is not a competent court to deal with the "matter in the said country. (*d*) The aforesaid does not prevent "a Finnish citizen from commencing proceedings for dissolving "the marriage in this country. (*e*) A wife who was a Finnish "citizen at the time of contracting the marriage is entitled to "commence in Finland proceedings for annulment of the "marriage."

Article 10: "(*a*) If one or both of the spouses are foreigners a "decree of divorce can be granted in this country only in that "case that the grounds for the decree exist in the laws of the "countries of both respective spouses and in the Finnish law. "(*b*) If the spouse has previously belonged to another foreign "country, a divorce may be granted on grounds that have taken "place during that time only in case divorce could be granted "on that ground also according to the law of that country."

Expert evidence was given at the hearing in London by Walter Johannes Holmsten, a Finnish lawyer, that although the judgment of the Abo Court of Appeal when dealing with its jurisdiction referred to article 8 of the Act of December 5, 1929, without specifying the paragraph relied on (as was the practice), the paragraph must, in fact, have been paragraph (*b*), since the wife was still a British subject. Paragraphs (*a*) and (*e*) concerned nullity, paragraph (*c*) would not be applicable to England, and paragraph (*d*) would be inapplicable by reason of the wife's British nationality. He stated, however, with regard to article 10 (*a*), that while desertion was a ground of divorce existing in the laws of both countries as required by that article, in his opinion it was not necessary for the desertion to have lasted for the full statutory period of three years required by English law.

Mr. Holmsten stated that the test of domicile in Finland was a test of residence rather than the stricter test required by

---

† The words "last lived together" might also be translated "last been "domiciled together," but there is not the same distinction in Finnish law as in English law between "domicile" and "residence," since the strict test of domicile in English law does not apply, although some measure of permanence is required, such as the establishment of a home.

English law. He further said that if a Finnish national husband deserted his wife in England, in circumstances similar to those which had founded jurisdiction in Finland in the present case, and the wife had obtained a divorce in England, the Finnish court would, in his opinion, recognize the validity of that decree.

Expert evidence was also given by Mr. Peter Crane, of the American Bar, that the decree would be recognized in the United States.

The husband had learned of the Finnish divorce in February, 1946, as a result of an inquiry after his family through the Red Cross, and discovered that his wife had gone to Stockholm in 1944 where, in fact, she continued to reside. In the meantime he had begun in 1940 to live with another woman, by whom he had two children, born in March, 1941, and September, 1946. He wished to marry that woman and, accordingly, wrote in March, 1946, after going to the registrar of marriages, for a copy of the Finnish decree. He obtained a sealed copy in December, 1946; but in 1947 he learned that the decree would not be recognized by the Registrar-General unless the court so directed. He saw a solicitor but found that he was unable to afford proceedings for divorce or otherwise; but he eventually obtained legal aid and presented this petition in April, 1955.

In his allegation in the alternative of desertion he alleged that he had asked his wife to come with him to England after certain differences had arisen with her family, and that she had refused, and had subsequently refused to rejoin him when he had written asking her to do so.

John B. Gardner for the petitioner. Although the petitioner did not learn of the proceedings until after the war, notice of them had been given by a form of substituted service similar to that in the English courts. The petitioner, moreover, has no wish to have the decree set aside on the ground of a failure of natural justice in view in particular of the children. The decree should not be invalidated merely because the petitioner did not in fact receive notice of the proceedings: *Igra* v. *Igra* [1]; *Maher* v. *Maher*.[2]

The jurisdiction of the Finnish court was founded upon a law similar to but not identical with that which provides jurisdiction in England under section 18 (1) (*a*) of the Matrimonial Causes

---

[1] [1951] P. 404; [1951] 2 T.L.R. 670.

[2] [1951] P. 342; [1951] 1 T.L.R. 1163; [1951] 2 All E.R. 37.

Act, 1950,[3] formerly section 13 of the Matrimonial Causes Act, 1937. It is also similar to but not identical with the law providing jurisdiction in New South Wales, which was recognized in *Travers* v. *Holley*,[4] and in Northern Ireland, which was recognized in *Carr* v. *Carr*,[5] in which *Travers* v. *Holley*[4] was applied by Barnard J. [He referred also to *Jackman* v. *Jackman*,[6] where the test was three years' residence.] The distinction is that the Finnish law required that the parties should have last "lived "together" in Finland (although with some degree of permanence envisaged in their previous residence together) instead of being domiciled there at the date of the desertion.

But although it was not necessary by Finnish law to establish a domicile (in the English sense) in Finland in 1929, the evidence here shows that such a domicile was in fact acquired by the parties by then. The wife, moreover, had been "ordinarily "resident" in Finland up to the date of the divorce in 1940. Had the jurisdictional requirements of Finnish law been identical in all respects with section 18 (1) (*a*) of the Act of 1950, those requirements would have been fulfilled. In so far as the recognition of this decree is not directly covered by *Travers* v. *Holley*,[7] it is submitted that the court may look beyond the local law at the realities in such a case, and that it would be consistent with the principles of comity accepted in *Travers* v. *Holley* [7] to recognize this decree.

---

[3] Matrimonial Causes Act, 1950, s. 18 (1): "Without prejudice to any "jurisdiction exercisable by the court "apart from this section, the court "shall by virtue of this section have "jurisdiction to entertain proceedings "by a wife in any of the following "cases, notwithstanding that the "husband is not domiciled in "England, that is to say:—(*a*) in "the case of any proceedings under "this Act other than proceedings for "presumption of death and dissolu-"tion of marriage, if the wife has "been deserted by her husband . . . "and the husband was immediately "before the desertion . . . domiciled "in England; (*b*) in the case of "proceedings for divorce or nullity of "marriage, if the wife is resident in "England and has been ordinarily "resident there for a period of three "years immediately preceding the "commencement of the proceedings, "and the husband is not domiciled "in any other part of the United "Kingdom or in the Channel Islands "or the Isle of Man."

[4] [1953] P. 246; [1953] 2 All E.R. 794.

[5] [1955] 1 W.L.R. 422; [1955] 2 All E.R. 61.

[6] (Unreported) September 27, 1956. In that case Judge Rawlins sitting as a special commissioner at Reading made a declaration in a reserved judgment in an undefended suit of the validity of a judgment of divorce granted on June 22, 1951, to a wife, then domiciled (by English law) in England, by the Superior Court of Middlesex County, Connecticut, United States of America. That court had found that the wife had resided continuously within the State for three years next before the date of the complaint and that the husband had wilfully deserted the wife and had continued in desertion with total neglect of all the duties of the marriage covenant for more than three years up to the date of judgment. By chapter 367 of the Connecticut General Statutes (revision of 1949) section 7327 such wilful desertion constituted grounds for absolute divorce in Connecticut; and by virtue of section 2256 (*c*) of chapter 367 a requirement that the plaintiff be resident within the State of Connecticut for three years next preceding the date on which an action for divorce is commenced, that is, from the date of the complaint, is a jurisdictional requirement without the proof of which the court would not have been seized with jurisdiction in that case. Judge Rawlins, having regard to the precise similarities both as to the English law of jurisdiction and as to the ground for divorce based his declaration upon *Travers* v. *Holley* ([1953] P. 246; [1953] 2 All E.R. 794) and *Carr* v. *Carr* ([1955] 1 W.L.R. 422; [1955] 2 All E.R. 61) and distinguished *Dunne* v. *Saban* ([1955] P. 178; [1954] 3 All E.R. 586) in which he observed the facts were different.

The submission that the court should have regard to the realities is supported by the fact that when domicile was the only recognized test, the court went beyond the local law of jurisdiction and had regard to the reality of domicile. A recent example was *Donaldson* v. *Donaldson*,[8] where a Florida decree was accepted on the basis of an acquired domicile although the local law required only 90 days' residence.

In *Dunne* v. *Saban* [9] Davies J. refused to apply *Travers* v. *Holley* [10] to a Florida decree in a case where the parties had lost their domicile in that State. But although it appears that he accepted the Queen's Proctor's submission that observations in *Travers* v. *Holley* [10] upon the recognition of foreign decrees granted to persons then domiciled in England were obiter, it is submitted that his judgment was directed to the problem of recognizing decrees where only a very short period of residence was required.[11] It is further submitted that in any event the observations in *Travers* v. *Holley* [12] were not obiter, but were based upon a finding that the parties were domiciled in New South Wales at the date of desertion, regardless of whether that domicile had been lost before the date of the petition.[13]

The development in the law in *Travers* v. *Holley* [14] is due to the English statutory exceptions which came into being some time after the rule of domicile was laid down in *Le Mesurier* v. *Le Mesurier* [15]: see, for example, the Indian and Colonial Divorce

---

[7] [1953] P. 246.

[8] [1949] P. 363; 65 T.L.R. 233.

[9] [1955] P. 178; [1954] 3 All E.R. 586.

[10] [1953] P. 246.

[11] [1955] P. 188, 189. The point was not taken that upon the finding of the Florida court the husband appears to have been held to have deserted the wife when they were in fact domiciled in Florida.

[12] [1953] P. 246.

[13] Ibid. 250, 255.

[14] [1953] P. 246.

[15] [1895] A.C. 517; 11 T.L.R. 481.

Jurisdiction Acts, 1926 and 1940, section 13 of the Matrimonial Causes Act, 1937, the War Marriages Act, 1944, and the Law Reform (Miscellaneous Provisions) Act, 1949. (Attempts to establish special jurisdiction for deserted wives by judicial decision prior to the Act of 1937 had failed: *H.* v. *H.*[16]; *Herd* v. *Herd.*[17]) It was on the basis of such English jurisdiction that the Court of Appeal was able to recognize the New South Wales decree upon principles of reciprocity.

The test of domicile as the basis of jurisdiction no longer "ensures practical uniformity," and adherence to the principle of insisting "upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled" will no longer "preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another": see *Le Mesurier* v. *Le Mesurier*[18] and *Wilson* v. *Wilson*,[19] cited in that case. The effect of *Travers* v. *Holley*[20] is to prevent the scandal which the rule in *Le Mesurier* v. *Le Mesurier*[21] sought formerly to avoid in cases where the law of the foreign country "corresponds" with ours. It would be in accordance with the view that such scandal should be avoided to extend recognition to a decree such as this where in reality the requirements of English law had been complied with. Otherwise the parties here would be man and wife in England, but strangers in Finland, and, as the expert evidence shows, in, for example, the United States.

There is a Scots authority, *Warden* v. *Warden*,[22] which contains observations similar to observations in *Dunne* v. *Saban*,[23] where Davies J. suggested[24] that the legislature would have made special provision for the recognition of foreign decrees not based on domicile if it had intended that they should be recognized. It is, however, inconceivable that English and Scots decrees based on three years' residence should not be mutually recognized, although there is no such express provision in the Law Reform (Miscellaneous Provisions) Act, 1949, which relates to both England and Scotland (see sections 1 and 2).

If the jurisdiction of the foreign court is recognized, the grounds upon which a divorce is granted do not matter: *Armitage* v. *Attorney-General*[25]; *Bater* v. *Bater (orse. Lowe)*[26]; *Mezger*

---

[16] [1928] P. 206; 44 T.L.R. 711.

[17] [1936] P. 205; 52 T.L.R. 709; [1936] 2 All E.R. 1516.

[18] [1895] A.C. 517, 538, 540.

[19] (1872) 2 P. & M. 435, 442.

[20] [1953] P. 246.

[21] [1895] A.C. 517.

[22] 1951 S.L.T. 406.

[23] [1955] P. 178.

[24] Ibid. 185.

[25] [1906] P. 135; 22 T.L.R. 306.

[26] [1906] P. 209; 22 T.L.R. 408.

v. *Mezger*[27]; and the fact that the Finnish court required only one year's desertion becomes irrelevant. [Reference was also made to articles by Professor Griswold in 65 and 67 Harvard Law Review, at pp. 228 and 823 respectively.[28]]

Cur. adv. vult.

Jan. 24. MR. COMMISSIONER LATEY Q.C. read the following judgment. In this case Frederick Norman Arnold, aged 55 years, of Camberley, Surrey, has petitioned under R.S.C., Ord. 25, r. 5, for a declaration that his marriage in England celebrated in 1922 was validly dissolved by a decree of divorce pronounced by the Court of Appeal at Abo, Finland, on March 15, 1940. He petitions, in the alternative, for a decree of divorce on the ground of his wife's desertion. The wife has been served with the petition, dated April 13, 1955, and has not appeared.

It was decided by the Court of Appeal in *Har-Shefi* v. *Har-Shefi*[1] that under R.S.C., Ord. 25, r. 5, such a declaration of status could be made in the divorce court without its being tacked on to a matrimonial cause, but in this case the alternative of a suit for dissolution of the marriage is attached. The facts necessary to enable the petition for the declaration to be heard may be put quite shortly. The marriage took place on February 13, 1922, at Paddington Register Office when both the petitioner, an Englishman born in England, and his wife, Elna Eugenia Alexandra Grefweberg, a national of Finland, were a very young couple. Soon afterwards the husband went to Helsingfors, or Helsinki as it is now called. He went with her to Helsinki, and, her people being well off, he was installed in a home which, in the course of time, he found was beyond his means. Nevertheless, he acquired a domicile of choice in Finland, and they had two children, sons, born in 1924 and 1926 respectively. He became an agent at Helsinki for the sale of various types of British manufactures; but finding that his home was costing him too much, and that in his view his wife's parents were exercising too great an influence in their lives, he returned to England in 1930. He wrote frequent letters to his wife in Finland asking her to join him with the children in a satisfactory home in England, but she either ignored or evaded his pleas. These requests became more rare as time went on and in her letters she never suggested that he should return to Finland, nor did she claim any maintenance. I am satisfied that at any rate by 1932 Mr. Arnold had reverted to his domicile of origin in England. Then came the war in 1939. During the war the wife, unknown to him, commenced a divorce suit at Helsinki on the ground that he had deserted her. The court of first instance dismissed the petition for lack of sufficient evidence, but the Court of Appeal at Abo found desertion proved and in March, 1940, granted the wife a judgment of divorce.

---

[27] [1937] P. 19; 55 T.L.R. 18; [1936] 3 All E.R. 130.

[28] The first article was written shortly before *Travers* v. *Holley* (supra); the second considers that decision. Both articles consider the value of a wider recognition of foreign decrees, and refer also to the "factual" situation as a relevant matter. The first article reviews several of the Commonwealth statutes by which jurisdiction is assumed in cases of deserted wives.

[1] [1953] P. 161; [1953] 1 All E.R. 783.

Mr. Arnold instituted inquiries at the end of the war to find out what had happened to his family, and learned through the Red Cross and finally through a cousin of the wife that the wife had got this decree of divorce. He did not know that until 1946. He had thrown in his lot with a single lady since 1940, by whom he had had two children, and he wanted to marry her. I am informed that on his application for a licence to marry, the Registrar-General in 1947 did not deem himself at liberty to sanction the proposed marriage until he could be satisfied that the Finnish divorce was valid in English law; therefore these proceedings.

I now have to try this issue. The general rule of jurisdiction in divorce in England is that English domicile only is the test and that has to be the domicile of the husband. Pausing there, the English conception of domicile is the most rigid in the world. It must be residence with the intention of permanent settlement in that place.

Throughout the war, and indeed before that, Mr. Arnold was domiciled in England and continued so. Various statutory exceptions have been created by Parliament, but only one section of the Matrimonial Causes Act, 1950, is relevant in this case and only then because of a comparatively recent decision in the Court of Appeal in *Travers* v. *Holley*.[2] That court held that it would be contrary to principle if the English courts refused to recognize a jurisdiction which, mutatis mutandis, they claimed for themselves; and that as the New South Wales courts by section 16 (*a*) of the New South Wales Matrimonial Causes Act, No. 14 of 1899, and the English courts by section 13 of the Matrimonial Causes Act, 1937, which is now reproduced in section

---

[2] [1953] P. 246.

18 (1) (*a*) of the Matrimonial Causes Act, 1950, possessed the same jurisdiction, a decree absolute of divorce made by the New South Wales court in 1944 was valid, even though the husband might have reverted to his English domicile of origin.

In the Report of the Royal Commission on Marriage and Divorce (1956, Command Paper 9678), it is recommended that it should be enacted that the courts in England should recognize a foreign divorce pronounced according to the law of (i) the domicile of both spouses or, (ii) the domicile of either spouse, or which would be recognized by the law of such country of domicile, and in such cases the European conception of domicile approximating to habitual residence would be accepted. It was further recommended that a foreign divorce should be recognized if granted in circumstances substantially similar to those in which the English courts exercise jurisdiction in respect of persons not domiciled here. None of these recommendations has yet passed into law, and I have to consider the present case in the light of decided authorities.

The principle enunciated in *Travers* v. *Holley*,[2] which I have summarized, was followed by Barnard J. in *Carr* v. *Carr*.[3] In 1948 a wife presented a petition for divorce in Northern Ireland (which for purposes of the matrimonial jurisdiction is, like Scotland, a foreign country). At that time the husband had acquired a domicile of choice in England. In 1954 the court in Northern Ireland exercised jurisdiction and pronounced a divorce on the ground of desertion, the case being uncontested. That court relied on the terms of section 26 of the Northern Ireland Matrimonial Causes Act, 1939, the terms of which were substantially the same as those in section 18 (1) (*a*) of the English Matrimonial Causes Act, 1950.

Meanwhile in 1953 the husband had presented in England a petition for divorce on the ground of his wife's desertion. She contested this petition on various grounds; but before it came to trial she obtained her decree in Northern Ireland, and in January, 1955, she presented a petition here for a declaration that the decree of divorce in Northern Ireland was valid, and that therefore the marriage had been dissolved. Barnard J. so found, following *Travers* v. *Holley*,[4] and made the declaration which the ex-wife sought.

This principle was not accepted in an earlier case by the Scottish courts in *Warden* v. *Warden*.[5] By the time that that case was heard a provision now contained in section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, was already the law applicable to Scotland also, under the Law Reform (Miscellaneous Provisions) Act, 1949, section 2. The Scottish courts in that case considered the argument that there should be reciprocity in regard to recognizing the exercise of a similar jurisdiction, but held that the Act of 1949 did not empower the Scottish courts to recognize foreign decrees of divorce other than those pronounced by the court of the husband's domicile. However, I have to apply English and not Scottish law on this question of jurisdiction.

---

[2] [1953] P. 246.
[3] [1955] 1 W.L.R. 422.
[4] [1953] P. 246.
[5] 1951 S.L.T. 406.

There was a later case to which Mr. Gardner has drawn my attention, *Dunne* v. *Saban*,[6] and I have to consider the facts and judgment in that case. It was an undefended petition presented in 1954 by a husband for a declaration that his marriage had been validly dissolved by a court in Florida in the United States of America in November, 1953. The marriage took place in England in February, 1950, the husband then having his domicile of origin in England. In June, 1951, the couple went to the United States of America and the husband acquired a domicile of choice in the State of Florida. At the end of 1952 he returned to England and reverted to his domicile of origin. His wife, according to his evidence, refused to return here, and in or about July, 1953, by which time she had been resident in Florida for about two years, she instituted divorce proceedings there on the ground of what was alleged to be cruelty, including an allegation that he had left her and said that he did not intend to see her again. A decree was made accordingly by the Florida court. The petition in England was really brought to ascertain the husband's legal position. It was urged on behalf of the husband on the English petition that as the English court recognized a wife's ordinary residence here for the purpose of jurisdiction it should recognize the same in Florida, and that although only 90 days' residence was required there to found jurisdiction as compared with three years here, nevertheless the principle of comity laid down in *Travers* v. *Holley*[7] applied.

On behalf of the Queen's Proctor it was argued that the principle expressed in *Travers* v. *Holley*[7] was obiter, and that therefore there could be no derogation from the test of the husband's domicile. Davies J. accepted this view and said[8] that the observations of the Court of Appeal in *Travers* v. *Holley*[7] were directed to a case where the extraordinary jurisdiction of the foreign court corresponded almost exactly with the extraordinary jurisdiction exercised by the English court, and he was far from satisfied that the jurisdiction exercisable by the foreign court was anything like the jurisdiction of the English court; and therefore he dismissed the petition for a declaration.

---

[6] [1955] P. 178.

[7] [1953] P. 246.

[8] [1955] P. 178, 188.

Coming back to the present case, I have had the evidence of Mr. Holmsten, a Finnish barrister qualified to state the Finnish law as to matrimonial causes and jurisdiction. He had examined the proceedings in Finland, and asserted that the substituted service of the wife's petition by advertisement during the war was in accordance with the practice of the Finnish competent court when the respondent could not personally be given notice, and that the decree was valid and final in Finnish law. He said that the Finnish courts, like the English courts, are under a duty to be sure that they have jurisdiction in divorce. On the point of whether natural justice had been complied with in granting a divorce against a man who had not been given notice of the proceedings, it is established that in this country notice by advertisement to an absent party must be accepted as proper notice; and therefore this court can have nothing to say against the Finnish decree on the score of an absence of natural justice as the practice is much the same in both countries. Mr. Gardner pointed out that the same view in similar circumstances was taken by Pearce J. in *Igra* v. *Igra*.[9]

Going on with Mr. Holmsten's expert evidence, under the Finnish Marriage Law of 1929, article 76, he said that desertion for a year previous to the petition was a ground for divorce. He made it clear today that there is no definition of domicile in Finnish law any more than there is in English law, that is to say, in any statute; but he did say that it is well established that the Finnish conception of domicile is the principal place of residence, and intention to reside permanently does not enter into the Finnish conception.

The Finnish Act of December 5, 1929, with regard to Family Relations, Chapter II, paragraph 8, provides (b) that if both spouses, or one of them, are foreign nationals, proceedings for divorce can be commenced if the spouses had last lived together in Finland but the defendant spouse has deserted the other or has left the country after the grounds for divorce have come into existence. Therefore by Finnish law he said there was jurisdiction to hear the wife's case there. But there was a proviso under paragraph 10 of that chapter to the effect, in this case, that if desertion was not a ground of divorce in England, of which the husband was a national, the Finnish court would have been unable to exercise jurisdiction. Mr. Holmsten also told me that if a Finnish national husband deserted his wife in England in the same circumstances and she obtained a divorce in England the Finnish courts would recognize the decree.

---

[9] [1951] P. 404.

There is a further provision in paragraph 8 that if in the country of which a spouse is a national the courts of that country only can dissolve his marriage, proceedings can only be commenced in Finland if there is not a competent court to deal with the matter in the country of the national, but this does not prevent a Finnish citizen from commencing proceedings for dissolution of marriage in Finland. As the wife was a British national at the time of the divorce proceedings in Finland, this provision does not apply.

The question is, having regard to the Finnish law, can I apply the principle in *Travers* v. *Holley*? [10] I find it necessary to go into that case in some detail. An English couple were married in England in 1937 and in the same year they emigrated to New South Wales, where the husband, according to the finding, adopted a domicile of choice. A child was born to them in August, 1938, and in September, 1939, on the war beginning, the husband's business collapsed, and in 1940 he left his wife to go to another place in New South Wales. In 1941 he joined the Australian Forces and in 1943 he was transferred to the British Forces. On August 23, 1943, the wife petitioned for divorce in New South Wales on the ground of his desertion. The husband did not defend the case and in November, 1944, the wife got her decree absolute. They both married again after that decree. On December 9, 1952, the husband was granted in this country a decree nisi, that is to say, against his first wife, on the ground that the Australian decree was invalid for lack of jurisdiction and that the wife had, therefore, committed adultery by the continuation of her union with her second husband.[11] The Court of Appeal, by two to one, held that the first husband had acquired a domicile of choice in New South Wales and that the 1944 decree was therefore valid. In the course of the judgments Somervell L.J. pointed out [12] that under the New South Wales section the date for jurisdiction was when the husband deserted the wife in August, 1940, being already domiciled in New South Wales. In

---

[10] [1953] P. 246.

[11] The Times, Dec. 10, 1952.

[12] [1953] P. 246, 250.

English law, the date of desertion is the relevant date, though in general the relevant date is that of the petition. On principle our courts in this matter should recognize a jurisdiction which they themselves claim. Jenkins L.J. was not satisfied that the husband acquired a domicile of choice in New South Wales, and in that he agreed with Mr. Commissioner Grazebrook Q.C., but he added [13] that if his colleagues' contrary decision was right that the husband did acquire a domicile of choice in New South Wales, then that court properly exercised jurisdiction and their decree would stand. Hodson L.J. found a domicile of choice in New South Wales also, but he said [14] that it was not necessary to decide when that was abandoned as it was after the date of desertion. He said that section 13 of the Matrimonial Causes Act, 1937, now incorporated in section 18 (1) (*a*) of the Matrimonial Causes Act, 1950, corresponded in substance with the New South Wales provision. Then he cited the well-known statement in the judgment in *Le Mesurier* v. *Le Mesurier* by Lord Watson [15]: "A decree of divorce a vinculo, pronounced by a "court whose jurisdiction is solely derived from some rule of "municipal law peculiar to its forum, cannot, when it trenches "upon the interests of any other country to whose tribunals the "spouses were amenable, claim extra-territorial authority." Hodson L.J. had first of all said this about that passage [16]: ". . . what entitles an English court to assume jurisdiction "must be equally effective in the case of a foreign court." His Lordship added [17]: ". . . where it is found that the municipal "law is not peculiar to the forum of one country but corresponds "with a law of a second country, such municipal law cannot be "said to trench upon the interests of that country. I would say "that where, as here, there is in substance reciprocity, it would "be contrary to principle and inconsistent with comity if the "courts of this country were to refuse to recognize a jurisdiction "which mutatis mutandis they claim for themselves."

Does the decision in *Travers* v. *Holley* [18] involve the grounds of divorce being substantially the same? I think not. The basis of jurisdiction does not depend on the grounds, unless under the private international law rules governing the jurisdiction of a court it is limited to pronouncing a decree only where the law of the domicile or the nationality of the spouse provides substantially the same ground. As I have pointed out, the Finnish court is governed by this rule, and the fact of desertion is a ground common to both English and Finnish laws. It was a coincidence that in *Travers* v. *Holley* [18] the prescribed period of desertion to afford the remedy of divorce was the same, but this aspect of the matter did not enter into the ratio decidendi of the Court of Appeal. It is quite clear that in general a decree of divorce of a competent foreign court must be recognized in this country although the ground of divorce in the foreign country is not one which would be effective in the English court: see, for instance, *Mezger* v. *Mezger* [19] and *Armitage* v. *Attorney-General*.[20]

---

[13] [1953] P. 246, 254.
[14] Ibid. 255.
[15] [1895] A.C. 517, 528.
[16] [1953] P. 246, 256.
[17] Ibid. 257.
[18] [1953] P. 246.

Having carefully considered the judgments in *Travers* v. *Holley*,[21] I deem that the principle laid down there was binding and not merely obiter, though at first sight it might have appeared to be obiter. As I have already indicated, the Court of Appeal in *Travers* v. *Holley* [21] in effect found that the relevant date for fixing jurisdiction was at the time of the desertion when the husband was still domiciled in New South Wales and not at the time of the divorce proceedings.

In all these cases I apprehend that the court has to look at the realities. In the present case the parties had not only last lived together in Finland when the husband was held to have deserted the wife: they were, in fact, domiciled in Finland according to English law at the date of the desertion. The wife, moreover, had been continuously resident in Finland for many years immediately preceding the divorce. I am told that subsequent to the divorce she moved to Sweden, where she is still living; but the fact that she has changed her residence since the decree really does not affect this issue. The fact that only six weeks or 60 or 90 days' residence suffices in certain States in the United States of America to found jurisdiction seems to me to be beside the point if in fact there had been, say, two years' residence or more, or even less, and the residence is genuine and bona fide and not merely for the purpose of getting a divorce in a convenient court. The necessity laid down by statute in England for three years' residence, in the case of a wife whose husband is domiciled abroad, is probably due to the notion that our courts could not be used for the convenience of birds-of-passage, and that the court had to satisfy itself that the petitioning wife had chosen her home in England, though by operation of law her domicile

---

[18] [1953] P. 246.

[19] [1937] P. 19.

[20] [1906] P. 135, 141.

[21] [1953] P. 246.

1957

ARNOLD *v.* ARNOLD.

Mr. Commissioner Latey Q.C.

was that of her husband domiciled abroad, and living either abroad or in England.

It is true that in the case of *Travers* v. *Holley*[21] the period of desertion prescribed was the same in the laws of both England and New South Wales—three years—whereas in Finnish law one year's desertion suffices for a decree. But here the desertion, as found by the Finnish court, was far more than three years, and surely the principle of comity and reciprocity laid down in *Travers* v. *Holley*[21] must be applied?

I do not say that if there were a case in which a wife went into residence abroad only for a short time, whether it were 90 days or even a year, with the mere intention of obtaining a divorce, the English court would recognize such decree of divorce. *Gatty* v. *Attorney-General*[22] is an illustration to the contrary in which an Englishman domiciled in England went to live in one of the States of the United States of America for over the period prescribed by the State law for jurisdiction in order to obtain what he believed at the time to be a final decree of divorce.

Each case must be dealt with according to the facts and the law of the place where a decree is granted. In this case I am quite satisfied that the principle in *Travers* v. *Holley*[23] applies, and I make the declaration prayed for.

Declaration as prayed.

Solicitor: *J. A. H. Powell, The Law Society Divorce Department.*

J. B. G.

---

[21] [1953] P. 246.

[22] [1951] P. 444; [1951] 2 T.L.R. 599.

[23] [1953] P. 246.

WOOD *v.* WOOD.

1956
Oct. 8, 9, 19.

Lord Merriman P. and Collingwood J.

C. A.

1957
Mar. 4, 5, 13.

Lord Evershed M.R., Hodson and Ormerod L.JJ.

Husband and Wife—Maintenance—Justices—Divorce—Effect on maintenance order—Foreign divorce—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7.

Husband and Wife—Divorce—Conflict of jurisdiction—Maintenance—Foreign decree based on domicile—No notice to wife—Recognition of decree on status—Order under section 7 *of Summary Jurisdiction (Married Women) Act,* 1895*—Comity—Reciprocity—Effect of United States decisions.*

In February, 1950, a court of summary jurisdiction made an order for maintenance in favour of a wife on the ground of desertion. The husband later went to America in the company of another woman, and acquired a domicile of choice in the State of Nevada, where he was granted a decree of divorce in September, 1954, on the ground that he and his wife had not lived together for three years. At the time the wife knew nothing of the divorce action, notice of which was served by advertisement in a Las Vegas newspaper. There was no evidence as to the laws of Nevada regarding the rights of an innocent wife to maintenance or alimony; and the magistrate, who found her guilty of no matrimonial offence, refused, on the husband's application, to discharge the order, deciding that to do so would be contrary to the principles of natural justice, and would allow the husband to benefit by his own wrong. On the contrary, he varied the order by increasing the amount in view of the husband's improved circumstances. On appeal from the Divisional Court discharging the magistrate's order:—

Held, (1) that the decree of the court of Nevada must be recognized as having effectively dissolved the marriage status since the husband had acquired a domicile of choice in Nevada.

Boettcher v. *Boettcher* [1949] W.N. 83 and *Igra* v. *Igra* [1951] P. 404; [1951] 2 T.L.R. 670 applied.

(2) That where a divorce supervened on an order for maintenance obtained under the Summary Jurisdiction (Married Women) Act, 1895, the order would not be thereby automatically determined.

Bragg v. *Bragg* [1925] P. 20; 41 T.L.R. 8 applied.

(3) That in considering a maintenance order which had survived a divorce the court's discretion was not limited to discharging it on being informed of the dissolution of the marriage, but the court had power to vary or to discharge it under section 7 of that Act.

(4) That that jurisdiction was not limited by questions of convenience and the concurrent jurisdiction of our courts as to maintenance; it was immaterial to the survival of the jurisdiction whether cesser of the marriage status had been brought about by an English or a foreign decree, or whether it had been obtained at the suit of the wife or the husband, though these matters were proper to be taken into account in the exercise of the court's discretion.

Pastre v. *Pastre* [1930] P. 80; 46 T.L.R. 175 distinguished.

(5) That in exercising the discretion it was relevant that the wife had not participated in the foreign divorce proceedings, that the question of maintenance had not been raised in them, and that the grounds on which the foreign divorce had been granted would not have been considered sufficient by English law.

Mezger v. *Mezger* [1937] P. 19; 53 T.L.R. 18; [1936] 3 All E.R. 130 and *Kirk* v. *Kirk* [1947] W.N. 161; 63 T.L.R. 422; [1947] 2 All E.R. 118 considered.

(6) That the payment of proper respect to a judgment of a foreign court of competent jurisdiction and to the principle of international comity would not in this instance go beyond the limits of the recognition given to it in the American courts, that is, the acknowledgment of the effect of the decree (which was ex parte) on the status of the husband and wife.

Estin v. *Estin* (1948) 334 U.S. 541 applied.

(7) And that, accordingly, the magistrate's order should be restored.

Decision of Divisional Court (Lord Merriman P. and Collingwood J.) reversed.

APPEAL from an order of the metropolitan magistrate sitting at the North London Magistrates' Court.

Cynthia and Samuel Wood were married on June 9, 1945. On February 7, 1950, Cynthia Wood, hereinafter called the wife, obtained an order on the ground of desertion under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925. The husband was ordered to pay to the chief clerk of the court on behalf of the wife a weekly sum of 60s. and, in addition, 15s. each week for the maintenance of each of the two children of the marriage (then aged nearly four and two respectively) until such child should attain the age of 16 years. The custody of the two children was thereupon given to the wife, the husband being granted access to them at all reasonable times. This order was based on the finding that the husband had, three months earlier, unlawfully deserted the wife. The part of the order relating to the payments for the wife's benefit was not conditional on the continued subsistence of the marriage, nor was any other limitation placed on the period of the payments.

The husband was an Englishman by birth and was at the date of the order domiciled in England. He was a showman, exercising his profession through a troupe of performing chimpanzees. In 1952 he attempted unsuccessfully to have the order discharged on the ground that the wife had committed adultery or, alternatively, that he had made a bona fide offer to resume cohabitation which the wife had unjustifiably rejected. The charge of adultery was found not to have been established, and the offer to resume cohabitation consisted of an invitation to join the husband in the company of his chimpanzees and his pregnant mistress.

In January, 1953, the husband took his animals to the United States of America, and in May he found his way to Las Vegas, Nevada. On September 29, 1954, the court in Las Vegas granted him a decree of divorce on the ground that he and his wife had not lived together for three years. The qualification for obtaining such a decree was residence in Las Vegas for six weeks. The wife knew nothing of the decree as service of the proceedings was by advertisement in a Las Vegas newspaper. Thereafter the husband ceased to make the payments ordered in 1950.

In 1956 he came to England to exhibit the chimpanzees at the Palladium in London, and on May 18, 1956, he appeared at the North London Magistrates' Court on a warrant for arrears of maintenance, then amounting to £260 10s. The husband applied for a summons to have the order discharged under section 7 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground that he was now divorced, and this application was granted, he being remanded on his own recognizances and agreeing to pay off the arrears (which were not disputed) at £40 per week —an undertaking which he kept. Five days later the wife applied to the same court for an order increasing the sum payable by the husband for the maintenance of herself and the two children, on the ground that his circumstances had improved.

On May 31, 1956, the husband's summons was adjourned and both were heard together on June 21, 1956. During the hearing the husband stated that he had decided to make his home at Las Vegas but had found that he was unable to do so unless he obtained immigration papers. In 1953 he had left the United States of America to get the necessary permits and had returned to England via France, having obtained the necessary permits in France. In March, 1954, he had returned to Las Vegas and had bought a house and land there. He stated that he intended to live there permanently and to become an American citizen after the expiration of the necessary five years' residence.

The magistrate in giving his decision said: "I am satisfied "that sufficiently long before the divorce the husband had "settled in Nevada, and that at the time of the divorce he "was sufficiently domiciled for a valid and binding decree to be "pronounced by the court. In law the wife's domicile follows "the husband's." He went on to comment on the substituted service of the petition, pointing out that the proceedings were never likely to come to her knowledge, and saying that he was satisfied that she knew nothing of them until after the decree. But in view of the husband's acquisition of a domicile of choice in Nevada he felt bound to recognize that the decree was effective and that the parties were divorced. He went on to say that in his view, in reliance on *Bragg* v. *Bragg*,[1] although the decree obtained by the husband in Nevada had effectively determined the marriage status, it had not determined his jurisdiction and discretion under section 7 of the Act of 1895[2]; and

---

[1] [1925] P. 20; 41 T.L.R. 8.

[2] Summary Jurisdiction (Married Women) Act, 1895, s. 7, as amended: "A court of summary jurisdiction ". . . may, on the application of "the married woman or of her hus- "band, and upon cause being shown "upon fresh evidence to the satisfac- "tion of the court at any time, alter, "vary, or discharge any . . . order,"

1956

Wood v. Wood.

that since, on the facts, the merits were all with the wife and since the husband's financial circumstances had substantially improved since 1950, the claims of natural justice required that he should dismiss the husband's application, and should, upon the wife's application to vary, increase the sums payable by the husband for the maintenance of the wife and the two children to the maxima of £5 per week and 30s. per week respectively.

The husband appealed to the Divisional Court.

C. L. Hawser and *M. Graham* for the husband. The basis of the magistrate's decision was that although the Nevada decree was valid as being that of the court of the domicile—and he accepted the husband's oral evidence that such a domicile of choice had been acquired—he still had a discretion to refuse to discharge the order which he might, upon the authority of *Bragg* v. *Bragg*,[3] exercise in the wife's favour. The magistrate had given consideration in reaching his decision to *Pastre* v. *Pastre*,[4] *Mezger* v. *Mezger*[5] and *Kirk* v. *Kirk*[6]; but it is submitted that the effect of those decisions, applied to the present case, is that where there has been a foreign divorce accepted as valid in England, the English courts will recognize that they no longer have jurisdiction over the parties, and will not interfere between them further, even if the one who has been granted the decree might appear by English standards to have been the guilty party, except to entertain an application to discharge an existing order. It is

---

[under this Act or the Acts mentioned in the schedule] "and may upon any "such application from time to time "increase or diminish the amount of "any weekly payment ordered to be "made, so that the same do not in "any case exceed the weekly sum of "five pounds. If any married "woman upon whose application an "order shall have been made under "this Act . . . shall voluntarily "resume cohabitation with her husband, or shall commit an act of "adultery, such order shall upon proof "thereof be discharged. Provided "that the court may, if the court "think fit—(*a*) refuse to discharge "the order if, in the opinion of the "court, such act of adultery as aforesaid was conduced to by the failure "of the husband to make such payments as in the opinion of the "court he was able to make under "the order; and (*b*) in the event of "the order being discharged, make a "new order that the legal custody of "the children of the marriage shall "continue to be committed to the "wife, and that the husband shall "pay to the wife or to any officer of "the court or third person on her "behalf, a weekly sum not exceeding "30s. for the maintenance of each "such child until the child attains "the age of 16 years. In making "such an order the court shall have "regard primarily to the interests of "the children."

[3] [1925] P. 20.

[4] [1930] P. 80; 46 T.L.R. 175.

[5] [1937] P. 19; 53 T.L.R. 18; [1936] 3 All E.R. 130.

[6] [1947] W.N. 161; 63 T.L.R. 422; [1947] 2 All E.R. 118.

accepted that such an application, however formal, should be made, and that a husband may be liable for arrears until such application. But there is upon a foreign divorce an incompatibility of jurisdiction.

The magistrate in the present case has held not only that he could refuse to discharge the order but that he might also vary it.

[LORD MERRIMAN P. Indeed, he has in effect made a new order between people whose marriage has been dissolved in a foreign jurisdiction.]

If the magistrate had a discretion, he gave no reasonable grounds for the manner in which he exercised it.

[LORD MERRIMAN P. He decided the matter upon the ground of natural justice. The husband had gone to Nevada with his mistress, and, if the magistrate had jurisdiction, that would have been a reasonable approach.]

David Henderson for the wife. If, as is submitted, the magistrate had a discretion in the matter, this is clearly a case where such discretion should be exercised in favour of the wife, in view of the husband's guilty conduct and the wife's innocence. The husband showed himself from the first determined to rid himself of his responsibilities towards his wife and family. Once the order is discharged, it would seem that the wife will have no further remedy, either in this country—even if the husband later settles here—or in the United States.

It has not been found since *Bragg* v. *Bragg*,[7] either in respect of an English or of a foreign decree, that there is no discretion to continue an order of a court of summary jurisdiction after a divorce. *Pastre* v. *Pastre*[8] is not a binding authority to the contrary, for it did not concern such an order, and Hill J. in his judgment[9] expressly distinguished the position from that in *Bragg* v. *Bragg*.[10] In *Mezger* v. *Mezger*[11] both parties had been before a foreign court, which had considered the issues between them, and had decided them against the wife; while the court of summary jurisdiction had in any event clearly exercised its discretion upon a wrong basis. In *Kirk* v. *Kirk*[12] the decree had been obtained by the wife in Scotland and there was no good reason why the order should not be discharged. But neither *Mezger* v. *Mezger*[13] nor *Kirk* v. *Kirk*[14] is direct authority for the proposition that an English court of summary jurisdiction has no discretion whatever to allow an order to continue once there has been a foreign divorce. Indeed, it was observed in *Prest* v. *Prest* [15] upon those two cases, and upon *Wood* v. *Wood* [16] (where the wife had been divorced in England upon the ground of desertion [17]): "In each of these cases this court exercised its "own discretion on the ground that it did not consider that the "justices had exercised a judicial discretion in such a way that "the exercise of their discretion ought not to be interfered with."

---

[7] [1925] P. 20.
[8] [1930] P. 80.
[9] Ibid. 85.
[10] [1925] P. 20.
[11] [1937] P. 80.
[12] [1947] W.N. 161; 63 T.L.R. 422.
[13] [1937] P. 19.
[14] [1947] W.N. 161; 63 T.L.R. 422.

The wording of section 7 of the Act of 1895 [18] itself implies a discretion in every case except where there has been adultery (subject to the proviso (*a*)) or a resumption of cohabitation.

It is accordingly submitted that every application to vary or discharge an order "upon cause being shown upon fresh evidence" must be considered according to the facts, and that a foreign divorce is no more than fresh evidence in that context upon which the court may in its discretion discharge the order, or vary it, or preserve it, in accordance with the principles in *Bragg* v. *Bragg*.[19]

[LORD MERRIMAN P. But *Bragg* v. *Bragg* [19] was a case in which the two courts had a concurrent jurisdiction: there is a considerable difference in seeking to exercise a discretion in a manner which appears to be contrary to the finding of a foreign court. Is there any decision in which an order has been continued in favour of a wife against whom a decree has been pronounced? [20]]

The decision of a foreign court is no more than a fact to be taken into consideration when the English court decides how to exercise its discretion. Proper weight will clearly be given to the grounds upon which such decision was reached. But here the merits of the wife's case were not affected by the nature of the Nevada decree. [Reference was also made to *Plunkett* v. *Plunkett*,[21] *Abson* v. *Abson* [22] and *Travers* v. *Holley*.[23]]

M. Graham in reply. The courts of the country in which a marriage has been dissolved are the only ones competent to deal with matters affecting the parties to a divorce. If the wife wishes for relief she must seek it in Nevada, although there is no evidence that she has a remedy in that State. [*Mezger* v. *Mezger*,[24] *Boettcher* v. *Boettcher*[25] and *Igra* v. *Igra*[26] were referred to.]

---

[15] [1950] P. 63, 68–69.

[16] [1949] W.N. 59.

[17] Not, as reported in *Prest* v. *Prest*, ante, on the ground of adultery.

[18] See footnote 2, ante.

[19] [1925] P. 20.

[20] Reporter's note: The position is considered in the judgment of the court, post, p. 265 et seq., and in *Wood* v. *Wood* [1949] W.N. 59, 60.

[21] [1937] P. 208; 53 T.L.R. 967; [1937] 3 All E.R. 736.

[22] [1952] P. 55; [1952] 1 T.L.R. 379; [1952] 1 All E.R. 370.

[23] [1953] P. 246; [1953] 2 All E.R. 794.

Cur. adv. vult.

LORD MERRIMAN P. The judgment which Collingwood J. is about to read is the judgment of the court.

COLLINGWOOD J., reading the judgment, said: This is a husband's appeal from an order made by the metropolitan magistrate, sitting at the North London Magistrates' Court, on June 21, 1956, whereby he dismissed the husband's application to discharge an order made on February 7, 1950, on the ground of his desertion, for payment to the wife of £3 per week for her maintenance, and 15s. per week for each of the two children. At the same time the magistrate granted the wife's application to vary the amount of the order and increased it to £5 per week for the maintenance of the wife and 30s. weekly towards that of each of the children.

The grounds of the appeal are: "(1) that the magistrate had "no jurisdiction to continue the order or to vary it; (2) that he "was wrong in law in holding that he had a discretion to refuse "the husband's application to discharge the order, and to continue and vary it as he did, and (3) that if the magistrate had "a discretion, his order was not a judicial exercise of such "discretion."

[His Lordship then stated the facts and continued:] The courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign countries at the commencement of the proceedings for divorce, and in considering the validity of a foreign divorce it is immaterial that the marriage sought to be dissolved abroad was solemnized in England, or that the divorce was granted for a cause which, in the view of the English law, would not entitle a petitioner to a decree in this country. Any doubts as to this were finally disposed of by the decision of the Court of Appeal in *Bater* v. *Bater*.[1]

In this case the magistrate has found that the husband, who at the time of the making of the original order for maintenance was domiciled in this country, had at the time of the granting of the divorce acquired a new domicile of choice in Nevada. There was clearly evidence on which he could so find, and counsel for the wife conceded that he was not in a position to challenge it, or, as a result, to question the jurisdiction of the Nevada court to grant a decree of divorce—the validity of which must be recognized by the courts of this country.

---

[24] [1937] P. 19.

[25] [1949] W.N. 83.

[26] [1951] P. 404; [1951] 2 T.L.R. 670.

[1] [1906] P. 209; 22 T.L.R. 408.

Moreover, the fact that the method of substituted service by a court of competent jurisdiction was, in fact, ineffective is also irrelevant. Thus, in *Boettcher* v. *Boettcher*,[2] service on the respondent, who was resident in England, was held to have been effective where, as here, it was made by advertisement in a local newspaper in an American State—Indiana—though such notice never in fact came to the notice of the respondent. In *Igra* v. *Igra*[3] the respondent, then a refugee in England from the Nazi regime, had no notice of his wife's proceedings in Germany, but Pearce J. held that this fact did not demonstrate that the German decree offended against natural justice. He said[4]: "As "there is a discretion in our own court to dispense with service, "we should be slow to brand a foreign decree as contrary to "natural justice (particularly when it was made in time of war) "merely because notice did not in fact reach the applicant. In "this case I have no evidence that the usual practice of appointing a curator absentis was not adopted, or that advertisement, "albeit ineffectual, was not used by way of substituted service."

In *Bragg* v. *Bragg*[5] the wife, who had obtained a maintenance order on the ground of desertion, subsequently obtained from the Divorce Court a decree on the ground of her husband's adultery and bigamy. No order for maintenance was made or applied for in the Divorce Court. The husband then took out a summons under the Summary Jurisdiction (Married Women) Act, 1895, asking for a discharge of the order on the ground that it had ceased to be operative or, if not, ought to be discharged as soon as the parties had ceased to be husband and wife.

The magistrate dismissed the summons on the ground that he had a discretion under section 7 of the Act, and ought not to exercise it against a woman who had subsequently obtained a divorce, in the absence of some good cause—which did not exist in that case. The Divisional Court upheld this decision. In the course of his judgment Sir Henry Duke P. said[6] that he thought the view was right that the husband must come to a court of summary jurisdiction to get rid of the order, although there had been a decree absolute for divorce, and it seemed to him to follow that in default of the obligatory grounds for discharge of an order (that is to say, adultery or resumption of cohabitation), before the husband could succeed he must satisfy the magistrate that justice required that the order should be altered, varied or discharged. He had failed so to satisfy the magistrate. The magistrate had thought it a very convenient thing that the order should subsist, and that a court which was close at hand to the parties should be able to give the wife assistance if she needed it, or give the husband relief if he were entitled to it. Sir Henry Duke P. entirely agreed [7] with these reasons.

---

[2] [1949] W.N. 83.

[3] [1951] P. 404; [1951] 2 T.L.R. 670.

[4] [1951] P. 404, 411–412.

[5] [1925] P. 20; 41 T.L.R. 8.

[6] [1925] P. 20, 25–26.

This case was distinguished in *Mezger* v. *Mezger*.[8] There a court of summary jurisdiction refused to discharge or vary a maintenance order made during the subsistence of a marriage since dissolved by the decree of a competent foreign court. The reasons for such refusal were: (a) that the marriage had been dissolved on grounds not recognized by English law, and (b) because the wife's financial position required the continuance of the maintenance. It was held that neither of these grounds showed a judicial exercise of the discretion, because there was no longer a subsisting marriage, and the summary jurisdiction court had no concern for the reasons for its dissolution, and in addition to the continuance of the maintenance being inconsistent with the foreign decree, it was without the province of the summary jurisdiction court to decide whether the former wife should be maintained by her former husband or by becoming chargeable to public assistance. In his judgment Sir Boyd Merriman P. said [9]: "But while following not merely loyally "but cordially the decision in *Bragg* v. *Bragg* it is necessary to "see how far it goes and how far it applies to the circumstances "in this case."

The President then referred [9] to the facts and judgment in *Bragg* v. *Bragg*.[10] He said [11] that, although it might be convenient and proper in cases where the facts were the same as in *Bragg* v. *Bragg* [12] that a maintenance order should be continued after a decree of divorce, yet in the case where the marriage had been dissolved by a court of competent jurisdiction in a foreign

---

[7] [1925] P. 20, 26.

[8] [1937] P. 19; 53 T.L.R. 18; [1936] 3 All E.R. 130.

[9] [1937] P. 19, 25.

[10] [1925] P. 20.

[11] [1937] P. 19, 28.

[12] [1925] P. 20.

1956

Wood. v. Wood.

country, after a contest in which the parties had mutually recriminated, and where the husband's allegations had been found to be proved, and the wife's counter allegations, including that of alleged failure by the husband to maintain her, had been held to be disproved, and in a case, moreover, where the court in this country could not have entertained a claim for compassionate allowance or for maintenance in any shape or form, because the parties could not possibly come before the court, and, therefore, the question of relative convenience, as between one court and another, did not arise, he found it impossible to say that there was a judicial exercise of discretion in continuing the award of maintenance as between former spouses who had for ever ceased to be husband and wife.

Langton J., in the course of his judgment, said[13]: "The case "of *Bragg* v. *Bragg*[14] provides an instance of the kind. In that "case the order for maintenance existed when the wife obtained "her decree. It is not surprising that in the English Divorce "Court the Divisional Court should have found it right and "convenient that an order for maintenance should be continued. "There is nothing there which could shock anybody's conscience, "and it was very convenient from the point of view of expense "and avoidance of litigation."

Bragg v. *Bragg*[15] had also been distinguished in *Pastre* v. *Pastre*,[16] where a wife had obtained a decree of judicial separation, followed by an order for permanent alimony. Subsequently the husband obtained a decree of divorce in the country of his domicile (which was French) on the ground, valid under French law, that the parties had been judicially separated for three years. The husband then applied to the English court for a declaration that the order for alimony had abated or, alternatively, for its discharge. Hill J. held[17] that the alimony order remained operative until set aside, but the status of the woman as wife and her consequential right to alimony having ceased, he was bound to discharge the order therefor. He added[18] that considering as he was the effect of the foreign judgment on a decree of judicial separation in the Divorce Court, he was in no way bound by the decision of *Bragg* v. *Bragg*[19] in relation to a court of summary jurisdiction.

---

[13] [1937] P. 19, 29.

[14] [1925] P. 20.

[15] Ibid.

[16] [1930] P. 80; 46 T.L.R. 175.

[17] [1930] P. 80, 84.

[18] Ibid. 84–85.

[19] [1925] P. 20.

A decision similar to that in *Mezger* v. *Mezger*[20] is found in *Kirk* v. *Kirk*,[21] where there had been a Scottish divorce, the husband being a domiciled Scotsman, and a maintenance order had been made in England at a time during the marriage when an English court of summary jurisdiction had jurisdiction over the case. After an inquiry about what pecuniary rights the wife had as ancillary to the decree of divorce in Scotland, the Divisional Court held,[22] reversing the finding of the justices, who had kept the order alive, that the proper exercise of their jurisdiction was to leave the wife to such remedy by way of maintenance as she had in the Scots courts.

In the course of the judgment[23] it was said that this court was not prepared to lay down that in no circumstances whatever could a maintenance order be kept in being after a decree of divorce by a foreign court. Nevertheless, it is clear that this court thought the existence of a foreign divorce was a matter of cardinal importance.

Again, in *Wood* v. *Wood*[24] the Divisional Court reversed a decision of justices who had refused to vary an order after the husband had obtained a decree on the ground of his wife's desertion, they having in effect come to their decision solely on the ground that the wife needed maintenance. In his judgment Lord Merriman P. said[25] that there was no doubt, on the unquestioned authority of *Bragg* v. *Bragg*,[26] that justices had jurisdiction in the proper exercise of their discretion to keep alive an order for maintenance in favour of a wife, and, for that matter, an order for custody, notwithstanding a subsequent decree of divorce. But he added that *Bragg* v. *Bragg*[27] was a case of a successful wife, and that no question had therefore arisen of her having disentitled herself to some form of maintenance, but that the situation was manifestly different when the wife was the guilty party in the divorce, if through her own fault she was no longer able to represent herself as a wife entitled to maintenance except in very special circumstances.

Lord Merriman P. also thought[28] that the case was covered by *Mezger* v. *Mezger*,[29] for he said[30] that once the question of the validity of the foreign decree of divorce in that case had been determined, the position had become exactly as if the decree had been an English one.

---

[20] [1937] P. 19.

[21] [1947] W.N. 161; 63 T.L.R. 422; [1947] 2 All E.R. 118.

[22] 63 T.L.R. 422, 423.

[23] Ibid.

[24] [1949] W.N. 59.

[25] Ibid. 60.

[26] [1925] P. 20.

[27] Ibid.

[28] [1949] W.N. 59, 60.

[29] [1937] P. 19.

[30] [1949] W.N. 59, 60.

We appreciate, of course, that in contrast with the case just referred to, this wife had not, so far as is known, been guilty of any matrimonial misconduct which disentitled her to claim maintenance; indeed, her rights in that respect in the State of Nevada are left wholly obscure. Nor, as in the case of *Mezger* v. *Mezger*,[31] was the wife before the court, still less had she recriminated in the suit, for, as has already been stated, she knew nothing about the proceedings at all.

None the less, the fact remains that her status as a wife has been put an end to by a court of competent jurisdiction on a ground recognized in that jurisdiction, and there is no reported case in which an order has been maintained in favour of a wife against whom a decree has subsequently been granted, whether by an English or a foreign court.

It would appear, therefore, that the reasoning in *Bragg* v. *Bragg*,[32] based on a convenient use of the concurrent jurisdiction in this country, leads to the following conclusions, viz., first, that in the case of an English divorce supervening upon a magistrate's order, the order should be discharged if the wife is the divorcee, except possibly: (1) in the case of a decree to both parties, or (2) where the Divorce Court has indicated the propriety of a compassionate allowance for the wife; and secondly, in the case of a wife being divorced by a foreign court of competent jurisdiction that the order must be discharged if the wife has been found not to be entitled to maintenance in that foreign court: see *Mezger* v. *Mezger*.[33] Further, if it is evident that her rights in the foreign country differ from those in this country, the proper course is to discharge the order and leave the wife to have recourse to whatever rights she may have in the foreign country: *Kirk* v. *Kirk*.[34] In our opinion, therefore, the same result as in the last case should follow also where, as here, no evidence has been given that she is entitled to any rights at all in the foreign country.

We fully appreciate and share the views of the magistrate about the apparent hardship to the wife if the order in her favour is discharged. It was made on the ground of the husband's desertion, and there appears to be no reason to suppose that the desertion had been terminated at the time of the foreign decree.

---

[31] [1937] P. 19.

[32] [1925] P. 20.

[33] [1937] P. 19.

[34] [1947] W.N. 161.

Indeed, the only suggestion to that effect is that when the husband went to America the wife declined to go with him. But her explanation of this refusal has been found to be that she was unwilling to make a third with the husband and his pregnant mistress, whom he has since married.

The present proceedings, however, have resulted in the enforcement of payment of a substantial amount of outstanding arrears; and, since the husband's business is likely to bring him to this country for considerable periods from time to time, it may well be that if the order were continued it might be enforced against him in this country in future.

Nevertheless, we do not think that it is permissible to allow these considerations to weigh against the propriety of setting aside the order in light of the foreign decree.

In our opinion it is most important to avoid any suggestion that effect is not being given to the foreign decree because of the grounds on which it is based, or on the ground that the substituted service was ineffectual, or that it is being assumed, without any evidence of the foreign law, that the husband's adultery or his desertion would be fatal according to the foreign law to his obtaining a decree on the ground of a three years' separation.

For these reasons we allow the appeal.

Appeal allowed.
Leave to appeal.

J. B. G.

The wife appealed.

G. Granville Sharp Q.C. and *D. Henderson* for the wife. Although the Nevada divorce must be recognized as having dissolved the marriage status, the maintenance order previously made in favour of the wife was not thereby automatically discharged, and, when the application was made to have it discharged on the ground of the divorce, the magistrate still had a discretion whether to confirm, to vary or to discharge it. The doctrine of divisible divorce is clearly recognized in the United States of America, and although Professor A. L. Goodhart has expressed the opinion (see the Law Quarterly Review, 1957, Jan., p. 29) that it does not apply in this country, the doctrine is only an elaboration of the principle which underlies the decision in *Bragg*

v. *Bragg*,[1] a case which was decided over 30 years ago and has been considered and approved many times by the courts: see, for example, *Plunkett* v. *Plunkett*.[2] Section 7 of the Summary Jurisdiction (Married Women) Act, 1895, which *Bragg* v. *Bragg* [3] seeks to interpret, has been twice amended by Parliament in other respects after that case was decided without alteration in this respect. The decision in *Bragg* v. *Bragg* [3] may, therefore, be said now to be part of the law, though the case itself did not go beyond the Divisional Court. Nor is there any decision in this country which would be in direct conflict with the doctrine of divisible divorce. The jurisdiction conferred by section 7 of the Act of 1895, as amended, is not confined to the period of a subsisting marriage. If that were so, the husband would have been in difficulty in sustaining his locus standi when he asked that the order previously made should be discharged (as Horridge J. pointed out in *Bragg* v. *Bragg* [4]). In the present case the husband has submitted himself to the jurisdiction, necessarily implying that his application was needed and that the order had not automatically been discharged by the decree. Once the validity of the divorce is established, the question whether a maintenance order survives cannot be affected by whether the cesser of the marriage status was due to a decree made by an English or by a foreign court, or whether the decree was at the suit of the wife or the husband. Both these matters are relevant in considering the exercise of the discretion.

It has been said that there is no case in which it has been held that where the wife was the respondent a maintenance order in her favour would continue notwithstanding the dissolution of her marriage. That is not, however, significant, for, apart from the case of incurable insanity, a wife could not in this country be divorced by her husband unless she had been guilty of some matrimonial misdemeanor. In this case she was divorced on grounds which would not have been considered sufficient in this country (though it is not, of course, sought to question the validity of the decree). She was not before the court and knew nothing of the proceedings until after the decree had been granted. That aspect distinguishes this case from cases such as *Mezger* v. *Mezger*,[5] where the parties mutually recriminated. In that case a German court of competent jurisdiction had gone into the whole issue subsequently before the magistrates' court and both parties had been present. In the present case not only was the wife not present but there is no evidence whether the question of maintenance was ever considered and adjudicated on by the court, nor what her rights, if any, were. It is, however, clear that she was not found to have been guilty of any matrimonial offence. It is significant that other matters ancillary to the marriage state, for example, the maintenance and custody of the children, have also not been dealt with by the Nevada decree, though it would seem that, if the dissolution of the marriage had put an end to the order for the wife's maintenance, it would have had the same effect on the order relating to the children and would also have disabled the wife from making an application for a new order under the proviso to section 7 added in 1925. [Reference was also made to *Prest* v. *Prest*[6]; *Kirk* v. *Kirk*[7] (where for convenience the matter was left to the Scottish court in which the wife had obtained her decree); *M'Queen* v. *M'Queen*[8]; *Forsyth* v. *Forsyth*,[9] and *Wood* v. *Wood*[10] (in which, while adhering to *Bragg* v. *Bragg*,[11] the order was discharged by the Divisional Court in the absence of evidence on which the discretion could be exercised).] *Boettcher* v. *Boettcher*[12] and *Igra* v. *Igra*[13] are not germane. [*Trestain* v. *Trestain*[14] was also referred to.]

---

[1] [1925] P. 20; 41 T.L.R. 8.

[2] [1937] P. 208; 53 T.L.R. 967; [1937] 3 All E.R. 736.

[3] [1925] P. 20.

[4] Ibid. 23.

[5] [1937] P. 19; 53 T.L.R. 18; [1936] 3 All E.R. 130.

The final argument against the wife is that international comity and the respect which should be afforded to decisions of foreign courts require that the order should be treated as discharged by the Nevada divorce. The American decisions of *Estin* v. *Estin*[15] and *Vanderbilt* v. *Vanderbilt*,[16] while only of persuasive force, show clearly that the courts of the State of New York, and any other State having similar laws, would not regard themselves as bound by the Constitution, particularly the full faith and credit clause, or presumably by principles of international comity, to give to an ex parte decree (whether obtained in Nevada or elsewhere) greater effect than having dissolved the marriage status. The form of the decree considered in *Vanderbilt* v. *Vanderbilt*[16] was the same as that in the present case and probably like that in *Estin* v. *Estin*.[17] [Reference was also made to *Williams* v. *North Carolina*.[18]] Some importance should be attached to the maintenance of the supremacy of our own law in our courts, particularly in relation to rights arising out of the peculiar intimacy of the married state—the proprietary rights of one party to the marriage obtained under an order of a court of competent jurisdiction in this country. The sanctity of such orders should not be disturbed beyond what is required by principles of international comity by an exaggerated respect for the decree of the foreign court, going beyond the respect which would be given in other States of the country of origin and beyond the respect which the courts of that country would themselves give to such decrees if made by a foreign court.

---

[6] [1950] P. 63; 65 T.L.R. 729; [1949] 2 All E.R. 790.

[7] [1947] W.N. 161; 63 T.L.R. 422; [1947] 2 All E.R. 118.

[8] 1920, 2 S.L.T. 405.

[9] [1948] P. 125; 64 T.L.R. 17; [1947] 2 All E.R. 623.

[10] [1949] W.N. 59.

[11] [1925] P. 20.

[12] [1949] W.N. 83.

[13] [1951] P. 404; [1951] 2 T.L.R. 670.

[14] [1950] P. 198; 66 T.L.R. (Pt. 1) 621; [1950] 1 All E.R. 618n.

[15] (1948) 334 U.S. 541.

[16] 1956, 1 N.Y., 2d., 342.

C. L. Hawser for the husband. The maintenance order determines automatically on dissolution of the marriage. The contrary view would involve giving two different meanings to " husband " and " wife" in section 7. *Bragg* v. *Bragg* [19] was wrongly decided, though in the special circumstances of that case the decision was no doubt convenient and gave effect to natural justice. It is significant that Sir Henry Duke P. at the beginning of his judgment in that case said that it seemed anomalous that an ex-wife could, after obtaining a divorce, contend that an order for her maintenance still subsisted, and he indicated that that view might be contrary to common sense. In *Mezger* v. *Mezger* [20] Sir Boyd Merriman P. said that he would follow *Bragg* v. *Bragg*,[21] but he limited its application to domestic decrees. It is clear that the reasoning in *Bragg* v. *Bragg* [21] could have no application to a foreign decree.

An order for the maintenance of the infant children of the marriage will also cease automatically with the dissolution of the marriage, but if the mother applies for and is given custody of the children she can obtain an order for their maintenance under the Guardianship of Infants Acts. The right to such an order is independent of the Act of 1895.

An order under section 7 of the Act of 1895 in favour of the wife can be made either on the ground of the husband's wilful neglect to maintain her or on his desertion. On proof to the magistrate that the ground on which the order was made has ceased to operate he must discharge the order. Neither desertion nor failure to maintain can continue once the marriage has been dissolved, for a husband cannot " desert " or neglect to maintain a woman who is not his wife. Consequently, even if an order for maintenance survives the dissolution of the marriage, the magistrate has no option but to discharge it once he is informed of the end of the marriage. *Bragg* v. *Bragg*[22] may, on this argument, be right to the limited extent that the order is not discharged automatically by the dissolution.

---

[17] 334 U.S. 541.

[18] (1942) 317 U.S. 287.

[19] [1925] P. 20.

[20] [1937] P. 19.

[21] [1925] P. 20.

[ORMEROD L.J. But if the order does not determine automatically, then the husband would have to invoke the jurisdiction of the court in order to start proceedings to have it discharged.]

He would have to apply by way of summons to dissolve the order. But if there is inherent jurisdiction in the court nothing flows from that.

In *Mezger* v. *Mezger*[23] it was said that the magistrate's discretion could only operate one way, and a discretion which can only operate one way is not a discretion at all. This interpretation of section 7 is supported by other sections. [Reference was made to sections 5 and 10.]

If the decree dissolving the marriage is granted to a husband by a foreign court, his obligations thereafter towards his ex-wife are to be decided according to the law of the place where the husband is domiciled and the decree granted. The reasoning of Hill J. in *Pastre* v. *Pastre*[24] applies exactly, though that case was concerned with section 190 of the Supreme Court of Judicature (Consolidation) Act, 1925. *Bragg* v. *Bragg*[25] does not apply in such cases: see *Mezger* v. *Mezger*.[26] In *Kirk* v. *Kirk*[27] the wife was left to such remedies as were available to her in the court where the decree had been obtained. The obligation imposed on a husband by English law to maintain his wife ceases to be relevant. If that were not so, it might be open to a wife to ask here for an order in her favour after a decree had been granted in Nevada.

[HODSON L.J. But that is what happened in *Vanderbilt* v. *Vanderbilt*.[28]]

That case must be used with care, for there was no evidence as to the relevant law in the New York State. The position would, of course, be quite different if there had been a specific provision in the English Act that, notwithstanding a divorce, a maintenance order in favour of the wife should continue. But the Act of 1895 has not so provided. A similar criticism may be directed against *Estin* v. *Estin*,[29] which, in any case, was only concerned with inter-State law.

---

[22] [1925] P. 20.
[23] [1937] P. 19.
[24] [1930] P. 80; 46 T.L.R. 175.
[25] [1925] P. 20.
[26] [1937] P. 19.
[27] [1947] W.N. 161.
[28] 1956, 1 N.Y., 2d., 342.

Trestain v. *Trestain*[30] is not in point, for the decree in that case was granted by an English court. The case of an English decree rests on a different footing, for, as Langton J. said in *Mezger* v. *Mezger*,[31] it may be convenient for the courts to interweave their instrumentality in dealing with questions of maintenance, to decide between themselves where such questions can most conveniently be dealt with (assuming that notwithstanding the divorce the wife's order has continued to subsist). No conflict is likely to arise between the courts in this country. But the position is quite different where the decree has been granted by a foreign court. Then there is potentially a conflict of jurisdiction and possibly of orders. The potentiality of conflict is what matters; it is not material whether conflict has actually arisen. In *Pastre* v. *Pastre*[32] there was potential conflict. In *Mezger* v. *Mezger*[33] the husband's case was strengthened, for there the German court had actually dealt with the matters before the magistrate. But it is not essential to show that the matter has been dealt with. In *Kirk* v. *Kirk*[34] the court had not considered the question of maintenance. In the present case there is no evidence whether the court had considered the question. The decree is in wide terms and purports to release the husband from all obligations of the married state, including, it would seem, the obligation to maintain his wife. The foreign court is seized with the question of maintenance and, even if it has not already dealt with it, it might do so hereafter, so that, if the wife's submissions were accepted, there might be two different orders, one made in this country and one in Nevada, requiring the husband to pay different sums to maintain his wife. It is a fundamental principle of private international law that full effect should be given to the decisions of foreign courts of competent jurisdiction. The decree would not be given full effect if the English magistrates or the English High Court were able to continue to exercise jurisdiction to deal with questions of maintenance, on the basis of a subsisting relationship of husband and wife.

---

[29] 334 U.S. 541.
[30] [1950] P. 198.
[31] [1937] P. 19, 29.
[32] [1930] P. 80.
[33] [1937] P. 19.
[34] [1947] W.N. 161.

If, however, all the foregoing submissions are wrong, the question then arises whether any particular grounds existed in favour of the wife which justified not merely continuing the order but increasing the amount which the husband had to pay. This point did not arise for decision in the Divisional Court. In substance the magistrate seems to have decided in the wife's favour because he thought that she needed the money and it was right that she should have it. He, therefore, considered that the Nevada decree had not affected his jurisdiction in any way; but no case has gone so far as that. It is submitted that the most that he could do was to continue the existing order.

Granville Sharp Q.C. in reply. It is not suggested that if the Nevada court had expressly dealt with the question of maintenance, and both parties had been present, that the English courts could thereafter have continued an order for maintenance in favour of the wife made before the decree was granted; but to say that a naked decree of divorce necessarily involves interfering with an order of a competent court in this country is exaggerating the competency of the Nevada court and giving exaggerated respect to it. The contention that *Bragg* v. *Bragg*[35] must be limited to domestic decrees is not sustainable in the light of the rest of the authorities. Finally, if a husband makes himself amenable to the jurisdiction and applies to have an order discharged, he opens the door to the magistrate refusing to discharge or increase the order.

Cur. adv. vult.

March 13. Lord Evershed M.R. stated the facts and said: It was suggested to the husband in the proceedings in May and June, 1956, before the North London magistrate (out of which this appeal has arisen and to which I shall later return) that the husband's primary purpose in going to Las Vegas and returning there in the following year was in order to obtain a dissolution by the courts of the State of Nevada of his marriage with the wife (having no cause to do so by the laws of this country) and, as a consequence, to disembarrass himself of all further liability towards his wife and their two children; or at least towards the former. It is the fact that in September, 1954, the husband obtained in Nevada a decree of divorce against his wife and that he thereafter ceased to make the payments ordered by the magistrates' court in 1950, the arrears of which payments in June,

---

[35] [1925] P. 20.

1956, amounted to about £250. On the other hand, the husband appears to have bought a house and land in Las Vegas and to have taken steps to obtain an immigration permit with a view to becoming in due course a citizen of the United States of America. In the course of the reasons for his decision of June, 1956, given for the benefit of the Divisional Court, the view is expressed by the North London magistrate that the husband may have been attracted to the State of Nevada by the circumstances that the rate of income tax there was less burdensome to him than the rate in England and that the Nevada climate better suited the dispositions of the chimpanzees—though it is not clear from the notes of evidence that these attractions were specifically put to the husband during the hearing. However that may be, the magistrate found as a fact that the husband had before the divorce proceedings decided to settle in Nevada and had acquired in that State a domicile of choice, and I agree with the Divisional Court that there was evidence upon which he could so find. It follows that, according to the law of England, the decree of divorce in Nevada which I have so far but briefly mentioned was, if duly pronounced according to the local law, effective to determine the marriage between the husband and the wife.

The decree is dated September 29, 1954, and recites that the defendant (that is, the wife) had not appeared in person or by attorney though " duly and regularly served . . . by publication " of a summons in the suit " in the Las Vegas Review-Journal . . . " pursuant to an order of court first had and obtained." The order then proceeds: " the plaintiff introducing evidence in " support of the allegations of his complaint, and the court being " fully advised in the premises, and finding that the plaintiff is " now and for more than six weeks prior to the commencement " of this action and ever since has been an actual and bona fide " resident of the county of Clark, State of Nevada, and actually " domiciled therein during all of said period of time, and that " this court has jurisdiction over both of the parties here to and " of this cause, and that all of the allegations contained in the " plaintiff's complaint are true and that plaintiff is entitled to " the relief prayed for in said complaint, and findings of fact, " conclusions of law, and written notice of entry of judgment " having been duly waived by the failure of the defendant to " appear in this action. . . . It is ordered, adjudged and decreed " that the bonds of matrimony heretofore and now existing " between the plaintiff, Samuel Wood, and the defendant, Cynthia

"Wood, be and the same are hereby dissolved and forever held "for naught, and the said parties hereby released from all the "obligations thereof and restored to the status of single persons."

We have not before us any copy of the "complaint" mentioned in the decree, but from the shorthand transcript of the few leading questions which were, at the hearing in Nevada, put to the husband by his attorney and the answers thereto (which is before us) and from the husband's evidence in the North London court last year it is quite clear that the sole ground of the husband's "complaint" was the fact that there had been no cohabitation between the husband and the wife since October, 1949, a period of time admittedly sufficient, according to the law of Nevada, to constitute a ground for dissolution of marriage.

[His Lordship referred to the attempt made by the husband in 1952 to have the order of 1950 discharged and to his offer to resume cohabitation. His Lordship continued:] In the circumstances it is not in doubt (and it has been conceded by Mr. Hawser on the husband's behalf) that the wife must be regarded for the purposes of the present proceedings as having been at all times innocent of any matrimonial offence as understood by the law of England, and that the husband's desertion which was the foundation of the order of 1950 was never determined otherwise than by the making of the decree of the Nevada court. No mention appears to have been made to the Nevada court of the English order of February, 1950.

I have referred at a little length to the terms of the Nevada decree, for some of the argument before us has turned upon the scope of its intended effect. The wife was in fact wholly unaware of the pendency of the husband's "complaint" to the Nevada court and it is clear that he did not expect or indeed intend that she would have any knowledge, until after the event, of the suit that he was bringing. The suit was what is called in the American cases hereafter referred to an "ex parte suit"—that is, a suit in which there never was any submission in fact by the wife to the jurisdiction of the Nevada court. But it has not been suggested on the wife's behalf that there was any failure on the husband's part properly to comply with the formal requirements of Nevada law; so that, having regard to the finding that at the relevant date the husband had acquired a domicile of choice in Nevada, the decree of September 24, 1954, was, by English law, at least effective to dissolve the marriage between the husband and the wife.

[His Lordship stated further facts, read section 7 of the Summary Jurisdiction (Married Women) Act, 1895, and continued:] In the opinion of the Divisional Court [1] the case of *Bragg* v. *Bragg*,[2] though now of "unquestioned authority," should be treated as "based on a convenient use of the concurrent jurisdiction in this country" and, therefore, could not extend to a case such as the present where the husband had obtained a divorce in a foreign court of competent jurisdiction and it had not been shown whether the wife had any rights as to maintenance in the country of that foreign court. "It would "appear . . . ," said Collingwood J.[3] in delivering the judgment of the court, "that the reasoning in *Bragg* v. *Bragg* [4] . . . leads to "the following conclusions, viz., first, that in the case of an "English divorce supervening upon a magistrate's order, the "order should be discharged if the wife is the divorcee, except "possibly: (1) in the case of a decree to both parties, or (2) "where the Divorce Court has indicated the propriety of a compassionate allowance for the wife; and secondly, in the case of "a wife being divorced by a foreign court of competent jurisdiction that the order must be discharged if the wife has been "found not to be entitled to maintenance in that foreign court "(see *Mezger* v. *Mezger* [5]); further, if it is evident that her rights "in the foreign country differ from those in this country, the "proper course is to discharge the order and leave the wife to "have recourse to whatever rights she may have in the foreign "country (*Kirk* v. *Kirk* [6]). In our opinion, therefore, the same "result as in the last case should follow also where, as here, no "evidence has been given that she is entitled to any rights at all "in the foreign country": and he later added at the conclusion of the judgment [7]: "In our opinion, it is most important to "avoid any suggestion that effect is not being given to the foreign "decree because of the grounds on which it is based, or on the "ground that the substituted service was ineffectual, or that it "is being assumed, without any evidence of the foreign law, that "the husband's adultery or his desertion would be fatal according "to the foreign law to his obtaining a decree on the ground of a "three years' separation." It will not escape attention that if this conclusion and the grounds for it are correct, then it is necessary for the courts of this country to say, notwithstanding the terms of the proviso to section 7 added by the Act of 1925, that the Nevada decree must be taken, in effect, to have put an end to the provision made for the maintenance of the two children living in this country and also (I assume) disabled the wife, though innocent of any matrimonial offence, from seeking any new order under the proviso to section 7 for the children's benefit.

---

[1] Ante, p. 266; [1956] 3 All E.R. 645.

[2] [1925] P. 20; 41 T.L.R. 8.

[3] Ante, p. 266.

[4] [1925] P. 20.

[5] [1937] P. 19; 53 T.L.R. 18; [1936] 3 All E.R. 130.

[6] [1947] W.N. 161; 63 T.L.R. 422; [1947] 2 All E.R. 118.

[7] Ante, p. 267.

Logically it is, then, first appropriate to consider the validity of the decision in *Bragg* v. *Bragg*[8] and, if valid, its ratio and scope; for it was Mr. Hawser's first contention for the husband that we should hold that *Bragg* v. *Bragg*,[8] which now comes for the first time before the Court of Appeal, was wrongly decided. Alternatively, he contended that it rested upon the convenience of preserving, in matrimonial proceedings, which are from first to last within the competence of English courts, the jurisdiction of those courts to grant maintenance both before and upon or after the pronouncing of decrees for dissolution of marriage (or, indeed, other decrees) so as to be inapplicable to cases of dissolution of marriage by competent foreign tribunals or at least so inapplicable where those tribunals have or may have (or are not shown not to have) jurisdiction to order maintenance in favour of a wife and (perhaps) of children. In support of this alternative contention Mr. Hawser relied upon the language of Langton J. in the later case of *Mezger* v. *Mezger*,[9] where he said: "The case of *Bragg* "v. *Bragg*,[10] as my Lord has said, indicates a very convenient "instrumentality by which the courts of this country may, so to "speak, interweave their respective powers and obtain the advan-"tage of local knowledge to supplement or implement the decree "of the court."

There is an obvious attraction in the view that section 7 of the Act of 1895 by its use of the phrases "the married woman" and "her husband" was intended only to be applicable so long as the marriage subsisted which had given rise to the original application for maintenance. On this view, however (as was observed by Horridge J. in *Bragg* v. *Bragg* [11]), "the husband" would be in difficulty in sustaining his locus standi when he asked that the order previously made should be discharged. On the other hand, if the previous order was (as in the present case) not qualified by any reference to the period of the marriage, it is no less difficult to see why it should automatically lapse upon the event of a decree dissolving the marriage, wherever pronounced. In any case it is to be noticed that in the present case the husband's application appears to be founded on section 7 of the Act of 1895. But whatever view I might have taken had the matter been res integra (and I am not to be taken as indicating what that view might have been), I am for my part satisfied that it is now too late to impeach the correctness of the decision in *Bragg* v. *Bragg*.[12] That decision was given in October, 1924. In the 32 years that have passed it has never been questioned, and I do not doubt that it has been acted upon very many times. The citations by Collingwood J. in the present case show that the present President has in the subsequent cases in which *Bragg* v. *Bragg*[12] has been considered in the Divisional Court followed it not only loyally but "cordially"; and in the cases in which, upon any view, it is applicable I agree in thinking that it meets the requirements both of common sense and of justice. Moreover, Parliament has twice since October, 1924, had under consideration the terms of section 7 of the Act of 1895; for that section was amended by section 2 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925 (which was passed on July 31, 1925), and section 2 (1) of the Guardianship and Maintenance of Infants Act, 1951.

---

[8] [1925] P. 20.
[9] [1937] P. 19, 29.
[10] [1925] P. 20.
[11] Ibid. 23.

I, therefore, am of opinion that *Bragg* v. *Bragg*[13] must now be taken to have been correctly decided. It follows, first, that an order for maintenance made pursuant to the Act of 1895 does not automatically lapse upon the determination of the marriage status of the parties to the order. I observe here that the order in the present case provided—as must commonly be the case—for maintenance both of the wife and of the children of the marriage; and it incidentally ordered that the sums payable for the children should be paid not to the wife but to the clerk of the court. The argument for a lapsing of the order so far as it related to the children must in any case be far less strong than that related to the maintenance of the wife. In the present case, indeed, the husband, as I have understood his case, has concentrated upon his liability towards the wife, and I shall henceforth substantially (though not exclusively) confine my observations upon the assumption that we are only concerned with the case of an order made upon a husband, before an ensuing divorce, to provide a sum for his wife's maintenance. But in considering the correctness of *Bragg* v. *Bragg*[13] and its ratio decidendi, as well as in considering the significance, both to these preceding questions and also to the exercise of any discretion which survives a decree, of who was the petitioner or "plaintiff" in the divorce suit and of the country where the decree was made, it is to be noted that, by the proviso added to the final sentence of section 7, the court is empowered, in the primary interests of the children, to make a fresh order for custody and maintenance of the children even where the original order has to be discharged by reason of proof of adultery on the part of the wife.

---

[12] [1925] P. 20.

[13] Ibid.

The question then remains: what did *Bragg* v. *Bragg*[13] decide, and what was the ground of the decision? Put more precisely, for present purposes, if the court's discretion survives in such a case the dissolution of the marriage, upon what principles should the discretion be exercised?

The facts in *Bragg* v. *Bragg*[13] may be shortly stated. A wife, having obtained an order for maintenance for herself and children against her husband, subsequently obtained a dissolution of her marriage on the ground of her husband's adultery and bigamy. The parties were at all relevant time of English nationality and domicile and the decree of divorce was made by the English court. After the divorce the husband took out a summons in the magistrates' court seeking to have the maintenance order discharged on the ground that the wife, having by her own act put an end to the marriage, had put an end also to the statutory jurisdiction to award maintenance. The argument was rejected by the magistrates and, upon appeal, by the Divisional Court, consisting of Sir Henry Duke P. and Horridge J.

"On the face of it," said the President at the beginning of his judgment,[14] "it seems anomalous that a woman who has obtained "an order for maintenance as a wife, such maintenance to be "provided by her husband, when she has put an end to the "relation of husband and wife may still say that the order for "the maintenance of the wife by the husband subsists. It is not "because it seems anomalous that that may not be the result of "the statutory provision, and neither is it conclusive to show that "it is contrary to common sense." The conclusion of the judgment was as follows—and I quote it at length because of its important bearing upon the ratio of the decision.

"Section 7 is, he says"[15] (referring to the argument of counsel for the wife), "the only section which limits the operation "of the order when it has once been obtained. Under that

---

[13] [1925] P. 20.

[14] Ibid. 23.

[15] Ibid. 25.

"section it is in the power of the court of summary jurisdiction "upon fresh evidence to alter, vary or discharge the order and to "increase or diminish the amount of the weekly payment. Then "there is this proviso: 'If any married woman upon whose "'application an order shall have been made under this Act,' "and so on, 'shall voluntarily resume cohabitation with her "'husband, or shall commit an act of adultery, such order shall "'upon proof thereof be discharged.' That is the only limitation "the legislature imposed. When this Act was passed in 1895 a "woman who added to desertion a grievance of her husband's "adultery might proceed for a divorce. One must assume that "the authors of this Act and the legislature which enacted it "were aware of that elementary fact. They took the view which "this appellant took, that such an order once made and while "the parties are alive is not got rid of except by an order of the "court of summary jurisdiction, and that an application must "be made. On the whole, I think the appellant was right in his "original view that he must go to a court of summary jurisdiction "to get rid of this order, although there had been a decree "absolute for divorce, and it seems to me to follow from that "that if there were not the statutory grounds of discharge of the "husband from his obligation under the order, then before the "appellant could succeed he must satisfy the magistrate that "justice required that the order should be altered, varied or "discharged. He failed to so satisfy the magistrate. I entirely "agree with the reasons upon which the magistrate founded that "view. The magistrate thought it was a very convenient thing "that this order should subsist and that a court, which was close "at hand to the parties, should be able to give the wife assistance "if she needed it, or give the husband relief if he was entitled "to it."

Horridge J. in his short concurring judgment confined himself entirely to the language and meaning of the Act. He said[16]: "The question in this appeal is whether or not there is any "provision in the Summary Jurisdiction (Married Women) Act, "1895, which limits the operation of orders made under section 5 "to the period of the existing marriage. I can find no such "words. In section 5 (*c*) the provision that 'the husband shall "'pay to the applicant personally' is merely defining the husband "at the time of the application. The 'applicant personally,' of "course, is the wife, but there are no words to show that the

---

[16] [1925] P. 20, 26.

" order itself is to be limited to the period of marriage. That " being so, the court of summary jurisdiction is thrown back on " section 7, and under that it is a matter of discretion which I " think in this case the learned magistrate has properly exercised, " and this appeal ought to be dismissed."

It is in my judgment clear that the decision of the court in *Bragg* v. *Bragg* [17] was founded upon the language of the Act of 1895 and of section 7 in particular, which was interpreted as having the necessary effect that an order for maintenance once made was not determined by the automatic effect of dissolution of the formerly subsisting marriage and that there had been conferred upon the appropriate court, after and notwithstanding the cesser of the marriage status, a discretion to decide upon the application of either party whether the order should be discharged or varied either by reduction or increase of the sums ordered to be paid—including, of course, the sums ordered to be paid for the maintenance of the children. It is true that Sir Henry Duke P. referred in the course of his judgment to matters of common sense,[18] but he did so by way of illustration and support for the parliamentary intention expressed in the Act, and the reference to convenience at the end of his judgment [19] was a reference to the reasons of the magistrate for the exercise of his discretion. I am, therefore, unable to agree with the view (for example) expressed by Langton J. in the passage which I have already quoted,[20] and also by Collingwood J. in the judgment now under review,[21] that the jurisdiction conferred by section 7 of the Act and preserved after decree is founded upon, and therefore limited by, considerations of convenience and the concurrent jurisdiction of our courts as to maintenance. On the other hand, I do not doubt that such questions may properly be taken into account by the magistrates' court in the exercise of the statutory discretion—as they were taken into account, in one direction, by the magistrate in *Bragg* v. *Bragg* [22] and by the Divisional Court, in the other direction, in the later case of *Kirk* v. *Kirk*.[23] In the present case, however, it would obviously be a somewhat cynical disregard of realities to suggest, on any ground of convenience, that the wife, who appears in this court as a legally aided litigant, should make her way to the court of Nevada and seek there to exercise such rights (if any) as she, an

---

[17] [1925] P. 20.
[18] Ibid. 23.
[19] Ibid. 26.
[20] [1937] P. 19, 29.
[21] Ante, p. 266.
[22] [1925] P. 20.
[23] [1947] W.N. 161.

Englishwoman now domiciled in England, may have to receive support there from her former husband.

I will refer here as briefly as I may to the three later cases cited to us and to the Divisional Court, in which the latter court, while acknowledging the authority of *Bragg* v. *Bragg*,[24] nevertheless reversed the refusal of the magistrates' court to discharge their previous order after dissolution of the respective marriages. They were *Mezger* v. *Mezger*,[25] *Kirk* v. *Kirk*[26] and *Wood* v. *Wood*.[27] (The case of *Pastre* v. *Pastre*[28] was also cited, in which Hill J. may be said to have indicated his own doubts about *Bragg* v. *Bragg*,[29] but I do not further refer to it, for it was not a case under the Act of 1895 at all, and I have already given my reasons for the view that it is now in any case too late to question the authority of *Bragg* v. *Bragg*.[29])

In *Mezger* v. *Mezger*[30] the parties were both Germans domiciled and resident in Germany at the time of the dissolution of their marriage by the German court, but they had lived for a time in England and during that period a magistrates' court here had made an order under the Act for the maintenance of the wife by the husband. The divorce in Germany had been pronounced upon the husband's suit, and although the ground alleged would not have sufficed according to English law, it was not in doubt that according to the German law, which was the proper law for the purpose, the order of the German court effectively dissolved the marriage. What is more important, the parties had "mutually recriminated" in the German proceedings and the German court decided, adversely to the wife, the issue raised by her that the husband had failed properly to maintain her. The magistrates' court here had nevertheless refused to exercise its discretion to discharge the former maintenance order upon an application for that purpose by the husband upon the grounds, first, that the German decree had been invalid (which was erroneous in point of law and fact), and, secondly, that the wife was in need of financial assistance. In such circumstances it is not surprising that the Divisional Court held that the magistrates' court had failed properly to exercise its discretion.

In *Kirk* v. *Kirk*[31] the wife, after obtaining a maintenance order from an English court, later obtained upon her own invocation of the jurisdiction a decree of divorce in Scotland, in which country the parties had at all times been domiciled. There were no children of the marriage. The Divisional Court, after directing an inquiry as to the (innocent) wife's rights in Scotland to the proper officer of the Court of Session, took the view that in all the circumstances of the case it would be more convenient and appropriate that all financial questions between the wife and husband should be decided by the Scottish court; but they expressly stated (in my view rightly) that the fact that the divorce had been obtained in a foreign country did not necessarily require that the court's discretion under section 7 of the Act must be exercised by discharging the original order. It is clear that the matter of convenience wears a very different aspect where the foreign court is at Edinburgh and not (say) in Germany or the United States of America.

---

[24] [1925] P. 20.
[25] [1937] P. 19.
[26] [1947] W.N. 161.
[27] [1949] W.N. 59.
[28] [1930] P. 80; 46 T.L.R. 175.
[29] [1925] P. 20.
[30] [1937] P. 19.
[31] [1947] W.N. 161.

In *Wood* v. *Wood*[32] the parties (who were, of course, wholly distinct from the parties in the present appeal) were at all relevant times English and domiciled in England. After the wife had obtained an order for maintenance the husband obtained a decree against her in England on the ground that she had deserted him. Again the magistrates' court had founded their discretion exclusively on the wife's financial needs, and in the absence of evidence of any other circumstances properly relevant to the exercise of the discretion the Divisional Court discharged the order, affirming once more their adherence to the decision in *Bragg* v. *Bragg*.[33]

In my judgment these later cases do not at all qualify what I hold to be the true foundation of the *Bragg* decision,[33] namely, the proper consequence of the interpretation of the terms of the statute. And if, according to the terms of the statute, the discretion survives and was intended to survive the cesser of the marriage status, it must in my judgment follow that it is immaterial whether that cesser has been brought about by an English or a foreign decree; though I do not, of course, doubt that the proved incidents of the foreign decree, so far as relevant to questions of maintenance (including convenience), will be matters proper to be taken into account in the exercise of the discretion.

It follows equally and of necessity that it is immaterial to the survival of the jurisdiction and of the discretion under the Act of 1895 whether (save in cases falling within the last sentence of section 7) the divorce is obtained at the suit of the wife or of the husband; though, again, the grounds upon which the decree was obtained would clearly be circumstances most relevant to the exercise of the discretion. I refer again to what I have earlier said, without repeating it, about orders made for maintenance of the children.

---

[32] [1949] W.N. 59.

[33] [1925] P. 20.

But there remains the further question which formed the subject of the last paragraph of Collingwood J.'s judgment already read and the negative answer to which, as I read the judgment, formed the main ground of the decision, namely: in such a case as the present is any exercise of the court's power and discretion, other than by way of a discharge of the original order, consistent with the payment of proper respect to the judgment of a court of competent jurisdiction of another State and with international comity?

The decision of the Divisional Court in the present case was the subject of a note by Professor Goodhart in the Law Quarterly Review (1957), January, p. 29, in which he referred to certain American cases, particularly the two cases of *Estin* v. *Estin*[34] (in the Supreme Court) and *Vanderbilt* v. *Vanderbilt* (in the Court of Appeals, New York[35]).

In both cases the questions before the court were primarily directed to the impact of article IV, section 1, of the Constitution of the Union (commonly called the full faith and credit clause) upon the law of New York State as expounded or enacted, a matter with which we are not, of course, concerned. In my judgment, however, it clearly emerges from the two cases that if a wife had obtained from her husband, then domiciled in New York, a maintenance order or its equivalent (as by the law of the State she might clearly do); and if thereafter her husband acquired an English domicile and obtained in England (the law of England being for this purpose assumed to be same as the law of Nevada) an "ex parte" divorce in terms and circumstances similar to the decree in the present case, the courts of New York State would regard themselves as perfectly free to continue or vary, as they thought fit, their own pre-existing maintenance order: either on the ground that the principle of comity did not require any greater acknowledgment of the "ex parte" decree than a recognition of the determination of the marriage status; or on the ground that since the English decree upon its face did not purport to do more than determine the married status (and particularly did not purport to affect the New York law as to maintenance and the order made thereunder) it was a matter wholly within the competence of the New York courts to decide what, according to their own law, was the effect of the English decree upon the position and personal rights of its own citizens (including the children of the marriage). The two cases were concerned, of course, with the State of New York; but it follows, in my judgment, that the result would be the same for any other State in the Union whose laws were the same as the laws of New York. And, in my judgment, a somewhat broader proposition follows also which does not involve acceptance by our courts of the so-called doctrine of divisible divorce—a phrase which I prefer for myself to avoid, save so far as it serves to distinguish, in the case of a divorce, between matters purely of status on the one hand, and matters of personal rights and obligations on the other, which flow from or are involved in a decree. In my judgment, the courts of any State in the Union whose laws included powers comparable to those contained in the Summary Jurisdiction (Married Women) Act, 1895, and an interpretation of those laws according to the ratio of *Bragg* v. *Bragg*,[36] would not be at all likely to regard themselves as limited by the principle of comity to accord to an English decree of divorce (according to our present laws) a scope which necessarily required the discharge of any pre-existing personal rights subsisting under a maintenance order of their own in favour of a wife or (perhaps still more) of children—at least unless, upon its face, the English order purported to determine also all relevant questions of maintenance. If this is right, then since questions of reciprocity must always be relevant upon the matter of comity, it seems to me that the foundation of the Divisional Court's judgment disappears, and it is not necessary that a proper respect on our part for the Nevada decree (which we, of course, concede) demands that the discretion vested in our courts by section 7 of the Act of 1895 must in the present case be so exercised that the order of 1950 should be discharged. No doubt in the exercise of that discretion due regard should be had to the circumstances and incidents of the foreign decree and to the rights (if any) as to maintenance and otherwise which the decree may confer or involve, as also to the question of convenience of forum. But on the facts of the present case, as proved, these considerations carry no weight in favour of the husband.

---

[34] (1948) 334 U.S. 541.

[35] 1956, 1 N.Y., 2d., 342; certiorari granted, 352 U.S. 820. (Affirmed June 24, 1957, in the Supreme Court by a majority, Frankfurter and Harlan JJ. dissenting.)

In *Estin* v. *Estin*[37] the facts (with one exception presently mentioned) were entirely comparable with those of the present case, if the State of New York is substituted for England—that is, the wife had obtained against her husband a support order (equivalent to our maintenance order) from the New York courts at a time when both were domiciled in that State. Later the husband, having acquired a domicile in Nevada, obtained an "ex parte" decree of divorce. The highest court in New York having (as the majority of the Supreme Court thought) held that their jurisdiction to maintain the support order survived the divorce, the question was whether that conclusion was consistent with the full faith and credit clause of the Constitution. The only difference in the facts in *Estin* v. *Estin*[37] from those in the present case was that the Nevada court appears, in the former, to have been aware of the New York support order.[38]

---

[36] [1925] P. 20.

[37] 334 U.S. 541.

There was a division of opinion in the Supreme Court, Jackson J. being of opinion[39] that New York was discriminating against a particular kind of decree, an "ex parte" decree, and that it could not do so consistently with the obligation of the full faith and credit clause: and Frankfurter J.[40] not being satisfied that the New York Court of Appeals had in truth reached the conclusion attributed to them and favouring a reference back to the New York Court accordingly. It does not anywhere appear from the report before us what was the form of the Nevada decree, but there seems to have been some divergence of view as to its purported effect. I should assume that the decree was in the same form as that in the present case, being (as I also assume) the common form of decree used by the Nevada court and being the form in fact used in the *Vanderbilt* case.[41]

The view of the majority of the court rested, as I follow it, upon the circumstance that the decree was an "ex parte" decree. Taking the view that the highest court in New York had held that a support order could survive such a divorce, and that the support order in the case before them had so survived, they were of opinion, first, that a change in marital capacity did not necessarily involve the result that all the legal incidents of marriage—including the quasi-proprietary personal rights of a wife under a support order—were thereby affected: and, second, that in the case of an "ex parte" divorce, there was nothing offensive to the full faith and credit clause—which in effect substituted command for comity[42]—in the view of the New York courts that the scope of the Nevada decree did not outside

---

[37] 334 U.S. 541.

[38] Ibid. 543.

[39] Ibid. 554.

[40] Ibid. 552.

[41] 1956, 1 N.Y., 2d., 342.

[42] 334 U.S. 541, 546.

Nevada extend beyond a determination of the marriage status. " Nevada . . . apparently follows the rule "—I quote from the majority opinion [43]—" that dissolution . . . puts an end to a " support order." I take this to be a reference to the view taken in Nevada of the effect of the decree of their own courts. But, they said [44] the claim of the petitioner if accepted would involve " nothing less than an attempt by Nevada to restrain " respondent from asserting her claim under (the) judgment " of the New York court.

Frankfurter J., though differing from the majority of the court, none the less agreed [45] that the New York courts might consistently with the full faith and credit clause hold that a separate maintenance decree of one of its courts survived a decree of divorce (whether ex parte or not) pronounced whether in New York or in Nevada. His doubt was whether such had been shown to be the New York law. As regards what he called the third ground of the majority's decision—above referred to, namely, that the Nevada court, though purporting according to its own law to determine the support order of New York, could not effectively do so in the absence of having personal jurisdiction over the obligee—Frankfurter J. said [46]: " My difficulty with the " third ground of the court's opinion is that Nevada did not " purport, so far as the record discloses, to rule on the survival " of the New York separate maintenance decree. Nevada merely " established a change in status. It was for New York to determine the effect, with reference to its own law, of that change " of status. If it was the law of New York that the divorce put " an end to its separate maintenance decree, the respondent's " decree would have been terminated not by the Nevada divorce " but by the consequences, under the New York law, of a change " in status, even though brought about by Nevada."

In the *Vanderbilt* case [47] the question concerned the right of a New York court, consistently with the full faith and credit clause, to grant maintenance for the first time to an ex-wife subject to the New York jurisdiction after a dissolution of her marriage by an " ex parte " decree of the Nevada court on her ex-husband's suit, the power so to do having been conferred by an enactment passed after the *Estin* case [48] pursuant to a recommendation of a Law Revision Commission which had drawn attention to the fact that the scope of the *Estin* decision [48] was limited to cases where a support order had been made before the divorce. In the New York Court of Appeals there was also a division of opinion. It appears from the dissenting judgment of Fuld J. that the form of the Nevada decree was the same as that in the present case, including the reference to release from all the duties and obligations of the marriage: and it was, accordingly, his opinion that the decree must be taken (if proper effect was to be given to it in accordance with the full faith and credit clause) to have removed the basis on which a maintenance order could be founded. In this respect he thought the order under review materially differed from an order made before the divorce, "the wife's property right" in which "would then "have assumed a status independent of the continuance of the "marital relationship. . . ."

---

[43] 334 U.S. 541, 547.
[44] Ibid. 548.
[45] Ibid. 549.
[46] Ibid. 551.
[47] 1956, 1 N.Y., 2d., 342.
[48] 334 U.S. 541.

The view of the majority of the court, however, was that, once the limited effect was accepted of an "ex parte" Nevada decree, namely, that it should not be recognized extraterritorially as doing more than put an end to the marriage status, then there was no ground for distinguishing between the right of New York, quoad those under its own jurisdiction, to make maintenance orders against a former husband for the first time after the status of marriage had ceased and the right to maintain an order which had been made against the former husband while the marriage subsisted: and it appears that in the view of the majority the Nevada decree, notwithstanding the language already quoted (and, I assume, notwithstanding any view in Nevada as to the effect of that language), did not by its terms extend to a wife's property rights. "But under 'the divisible divorce' "doctrine," they said, "the defendant's Nevada divorce had no "effect (any more than it said anything in terms) as to plaintiff's "property rights. Its sole effect was to end a marriage and it "has been given that effect in New York."

Having regard to the circumstance that the questions involved in the American cases were primarily directed to the constitutional position imposed by the full faith and credit clause, I have thought it right to refer to them in some particularity, and to extend my references to the opinions of the dissenting minorities. In my judgment, consideration of the two cases of *Estin* [49] and *Vanderbilt* [50] justifies the conclusion which I have earlier formulated and provides, as Mr. Granville Sharp argued, not only persuasive authority in support of his contention but also, in law, an answer to the final paragraph of Collingwood J.'s judgment upon which the decision of the Divisional Court is founded.

---

[49] 334 U.S. 541.

[50] 1956, 1 N.Y., 2d., 342.

It is one of the difficulties of this case that no evidence was given before the North London court of the effect and scope of the Nevada decree according to the laws of that State. The husband appears to have stated in his evidence that "the decree "only gave him a liability to maintain the children." But the husband was not a competent witness upon such a matter; and it may fairly be said that, since the husband was seeking a discharge of the order of 1950 upon the sole ground of the Nevada divorce, it was for him to prove (if he could) that the decree, at least according to the law of that State, comprehended and put an end to all liability for maintenance of his wife, and (presumably) of his children.

In the circumstances it is necessary for this court to form the best view it can of the scope of the decree according to its form—not forgetting the formula "the said parties are hereby "released from all obligations" (of the marriage). But we are assisted also by the views of the judges in the *Estin*[51] and *Vanderbilt* cases.[52] The judgments disclose, as I have earlier mentioned, some divergence of view. But I conclude that whatever might be the intent as to future obligations marital (strictly so called) or otherwise, the Nevada court did not purport and could not have purported to override or "set at naught" the obligations and rights in England created by virtue of the Act of 1895 and the order made thereunder in 1950, of which the court knew nothing.

If I am right so far, what remains can be briefly stated. Upon the husband's application I can see no ground whatever, having due regard to all the circumstances of the case and of the two parties, for interfering with the exercise of the discretion by the North London Magistrates' Court or for quarrelling with the view expressed by that court that a discharge of the order would be contrary to justice. I am indeed assisted to the conclusion by the fact that counsel for the husband did not contend, upon the hypothesis on which I am now proceeding, that any other order could or should have been made.

Upon the wife's application I also reach the same result. It must, no doubt, be a very rare thing indeed for the court here to vary a former maintenance order by increasing its amount

---

[51] 334 U.S. 541.

[52] 1956, 1 N.Y., 2d., 342.

C. A.
1957

Wood v. Wood.

Lord Evershed M.R.

after the wife has been divorced by a foreign court of competent jurisdiction. But it is clear that in the present case the fact that the wife was the respondent (or "defendant") to the divorce proceedings is itself of no significance. The law of Nevada appears to be that non-cohabitation in fact for the requisite period gives to either party to the marriage the right to seek dissolution. As I have earlier stated, the case has proceeded upon the view that the wife has at all times been (unlike the husband) wholly innocent of any matrimonial offence or of any conduct which would disqualify her from seeking relief under the Act of 1895. The husband appeared and gave evidence, as did the wife, before the North London Magistrates' Court. He submitted to its jurisdiction and the circumstances of both parties were closely investigated. It was proved in evidence that the troupe of chimpanzees, exhilarated no doubt by the North American climate, have increased the husband's disposable income to a figure six or eight times as great as that which he enjoyed in 1950. In my judgment, nothing in the facts or incidents of the divorce decree, nothing in the conduct of either party, nothing in their financial circumstances, justifies any interference with the exercise by the magistrates' court of its discretion which was arrived at without any misapplication of legal principle. I am again comforted by the fact that Mr. Hawser, for the husband, did not really suggest that there was any ground of unfairness or misdirection as to the facts upon which he could complain of the assessment of his client's liability at the maximum figure of £8 per week for the wife and two children.

For the reasons which I have tried to express I think that this appeal should be allowed and that the two orders of the magistrates' court of June 21, 1956, should be restored.

Hodson L.J. The following questions arise on this appeal: (1) Does an order for maintenance payable by a husband to a married woman under the provisions of the Summary Jurisdiction Acts survive a divorce? (2) Does the answer to the first question depend on whether the divorce is pronounced in favour of the wife? (3) Does it depend on whether the decree of divorce is pronounced by an English or by a foreign court? (4) If the order survived the divorce, must the court discharge the order on being informed of the divorce? (5) If there is no compulsion to discharge the order, is there a discretion to discharge and vary the order and how is that discretion to be exercised?

There is much to be said for the view that the effect of the dissolution of the marriage is to destroy automatically the obligations that arise therefrom. As Douglas J. graphically put it in the American case of *Estin* v. *Estin*,[53] " the tail must go with the " hide." This result is logical, but the question turns on the construction of an English Act of Parliament, namely, the Summary Jurisdiction (Married Women) Act, 1895, s. 7. [His Lordship read the section, so far as material, and continued:] The Summary Jurisdiction (Separation and Maintenance) Act, 1925, added a proviso in section 2 (2) to the effect that upon resumption of cohabitation the order should cease to have effect.

On the construction of this section it can be fairly argued that since the title of the Act is the Summary Jurisdiction (Married Women) Act and the words " married woman " and " husband " are used throughout to describe the persons who may apply for orders and the persons against whom orders may be made, so such orders must expire with the marriage.

Section 7 contains the power in the court to vary or discharge an order and it is argued that " married woman " and " husband " must bear the same meaning in this section as in the rest of the Act and cannot include divorced women and divorced husbands. Moreover, the power to discharge an order is normally exercised when, for example, the desertion upon which the order was founded has come to an end and the right to receive separate maintenance is therefore at an end. When the husband and wife are divorced the order can never be discharged on this ground, since their right to consortium having gone the possibility of desertion no longer exists. Hence it is said that the statute has no application to divorced persons and any order made thereunder must die with the marriage when a decree of divorce takes effect.

In *Bragg* v. *Bragg*,[54] however, decided by the Divisional Court, an opposite conclusion was reached. It was held that the decree does not ipso facto discharge a maintenance order obtained under the Act of 1895 nor does such dissolution compel the court to discharge such an order. Every such case, it was held, comes within the discretion given to the court by section 7 of the Act to vary or discharge the order on evidence of fresh facts. Horridge J. pointed out that there were no words in the Act to show that the order itself is to be limited to the period of the marriage. Sir Henry Duke P. thought that there were grounds of common sense why an order which dealt with maintenance

---

[53] 334 U.S. 541, 544.

[54] [1925] P. 20.

C. A.
1957

Wood
v.
Wood.

Hodson L.J.

and not with general obligations of married life should continue to subsist. *Bragg* v. *Bragg* [54] was decided in 1924 and has been followed consistently since; and Parliament when amending the Act of 1895 in 1925 and again in 1951 has not taken the opportunity of limiting the scope of the Act as interpreted by the Divisional Court.

If *Bragg's* case [54] was correctly decided the answer to the first question is in the affirmative. In my opinion it was, and there is nothing contrary to common sense or the plain language of the statute in this construction even though it produces the result of what is called in the United States, "divisible divorce," that is to say, it does not follow that because a marriage is dissolved the prior financial obligations of a husband to a wife must necessarily fall with it.

In *Estin* v. *Estin* [55] the Supreme Court of the United States held that a New York support decree survived a subsequent Nevada divorce. The decision of the Supreme Court turned mainly on article IV, section 1, of the Constitution, "the full "faith and credit clause," but it appears from the decision that the New York court had maintained that its order was not destroyed by the Nevada decree. See also *Vanderbilt* v. *Vanderbilt*,[56] a decision of the New York Court of Appeals which maintains the same principle; although carrying it to a length outside the scope of the English Summary Jurisdiction Act or the Matrimonial Causes Act which in the first case does not provide for an application for the first time after divorce and in the second does not provide for such an application after a decree which is not an English decree. See section 19 of the Matrimonial Causes Act, 1950. These cases are of persuasive authority.

As to the second question, the Divisional Court seems to have thought that the *Bragg* [57] principle should not be applied when the wife is the unsuccessful party to the divorce except in a limited class of case, of which this is not one. See also the observations of Lord Merriman P. in *Wood* v. *Wood*,[58] who, however, was careful to make clear that he was not saying that in no circumstances can justices exercise their discretion to keep an order alive in favour of an unsuccessful wife.

The court will, if it has a discretion under section 7 of the Act, be entitled to receive evidence as to the facts. In this case we know that on the facts proved the husband deserted the wife prior to the divorce. The order of the court of summary jurisdiction was made on that ground and, as the Divisional Court stated, there appears to be no reason to suppose that the desertion had been terminated at the time of the foreign decree, the only suggestion to that effect being that when the husband went to America the wife declined to go with him, her explanation of this refusal having been found to be that she was unwilling to make a third with the husband and his pregnant mistress.

---

[54] [1925] P. 20.
[55] 334 U.S. 541.
[56] 1956, 1 N.Y., 2d., 342.
[57] [1925] P. 20.
[58] [1949] W.N. 59.

The validity of the Nevada divorce is not in question and the grounds upon which relief was claimed (immaterial to the question of jurisdiction) were that the parties had not lived together for three years. No matrimonial offence was there alleged and there are no facts to justify the conclusion that because the wife was not the petitioner or actor in the divorce proceedings she should, therefore, be in a worse position than if she had been a successful suppliant for relief.

It would be open to the husband to raise any relevant matters to show cause why the summary jurisdiction order should not be continued. Indeed, in this case we were told that in 1952 he did so and endeavoured unsuccessfully to show that she was or had been living an unchaste life.

On the facts it seems difficult to envisage a set of circumstances more favourable to the wife and I cannot regard the fact that she was respondent to the proceedings and divorced on the prayer of her husband as a matter to be put in the scales against her. Indeed, the Nevada proceedings exemplify a tendency to be found in the modern exercise of divorce jurisdiction to permit proceedings to be taken not on the ground of an injury inflicted on the petitioner or claimant by the opposite spouse but on the ground that it is thought desirable or expedient that there should be a divorce. The ground of three years' separation involves no imputation of guilt.

The case of a wife who, as in this case, has no knowledge of proceedings taken at the instance of her husband which have the effect of bringing her marriage to an end is, I should have thought, a stronger one than that of the petitioner in such a case as *Kirk* v. *Kirk*.[59] In that case a wife who had obtained a maintenance order under the Summary Jurisdiction Act in England subsequently sued her husband for divorce in Scotland. It was held in effect by the Divisional Court that she must take the consequences and rely on such remedies as the Scottish courts could give her and she was not permitted to enforce the summary jurisdiction order. In the present case the wife, on the other hand, has been quite helpless in the divorce proceedings from beginning to end and had had no part in them.

---

[59] [1947] W.N. 161.

As to the third question, once the question of the validity of the foreign decree is determined, the position is, in my opinion, exactly the same as if the decree had been an English one: compare *Mezger* v. *Mezger*[60] and *Kirk* v. *Kirk*.[61] In the former case the exercise of discretion by a court of summary jurisdiction was reversed since neither of the reasons given, to one of which I return later, showed a judicial exercise of discretion, and further because the wife's allegations of failure to maintain had been disproved in the foreign proceedings to which she was an active party. In *Kirk* v. *Kirk*,[61] where there had been a Scottish divorce following upon an English order for maintenance, the court expressly refrained from deciding against the wife merely because the foreign decree ipso facto destroyed her right to maintenance.

It was suggested in argument that the form of the Nevada decree which ends with the words "the said parties are hereby "released from all the obligations thereof and restored to the "status of single persons" is destructive of the wife's claim and brings the case into line with *Mezger's* case,[62] in which the maintenance obligation had been litigated between the parties. I do not accept this contention since here there was no evidence that the Nevada court ever entertained, much less adjudicated upon, a claim for maintenance, and there is no reason on this account why any discretion there may be to keep the order alive should not be exercised in favour of the wife.

As to the fourth question, it was contended that even accepting the construction put upon the Act of 1895 in *Bragg's* case[63] to the effect that the order survived the divorce, the court must upon proof of a valid decree discharge the order. This argument was based on the reasoning of Hill J. in *Pastre* v. *Pastre*,[64] the headnote of which reads as follows: "The basis of a wife's "right to receive permanent alimony from her husband is that "the marriage is subsisting and that she is still a wife. If after "a decree for judicial separation and an order for the payment "of alimony the marriage is put an end to by the decree of a "court of competent jurisdiction the status of the woman as "wife and her consequential right to alimony have ceased to

---

[60] [1937] P. 19.
[61] [1947] W.N. 161.
[62] [1937] P. 19.
[63] [1925] P. 20.
[64] [1930] P. 80.

"exist. The order for alimony, however, which in its common "form is limited till further order, remains effective till an "application is made for its discharge."

Hill J. said that the order was expressed to be until further order, and that until further order it was effective. He added: "I am now asked to make a further order—namely, to discharge "the order for payment in the future. In my opinion I have no "alternative but to do so. I cannot order a man who has ceased "to be a husband to pay alimony to a woman who has ceased to "be a wife. The whole basis of an order for permanent alimony "is gone." He distinguished *Bragg* v. *Bragg* [65] as depending upon the terms of the Summary Jurisdiction (Married Women) Act, which he described as an Act of a very special nature giving magistrates powers which the divorce courts did not possess in some respects.

The jurisdiction to order alimony depends on statute, the then relevant provision being section 190 (4) of the Supreme Court of Judicature (Consolidation) Act, 1925, which reads as follows: "Where any decree for restitution of conjugal rights or judicial "separation is made on the application of the wife, the court "may make such order for alimony as the court thinks fit." If the order for alimony survives the divorce, as Hill J. thought, there is nothing in the statute to show that it must be discharged on divorce any more than there is a provision to that effect in the Summary Jurisdiction (Separation and Maintenance) Act, 1925.

It may be that different considerations apply to alimony, but I am not persuaded by the reasoning of Hill J. that the decision in *Bragg's* case [65] that a maintenance order could be permitted to remain in force after a divorce was wrong. It is to be noted that the decision in *Pastre's* case [66] could in any event be supported on the ground that the wife was an active participant in the French divorce proceedings.

As to the fifth question, if there is no compulsion to discharge the order, it is, I think, clear on the language of section 7 of the Act of 1895 that there is a discretion in the justices to alter, vary or discharge the order upon cause being shown to the satisfaction of the court at any time. This discretion was exercised by the stipendiary magistrate by refusing the husband's application to discharge the order and by varying the amount payable to the wife in an upward direction. It is not suggested that the amount payable under the proposed variation is in itself excessive.

---

[65] [1925] P. 20.

[66] [1930] P. 80.

In considering the question of discretion I have been indebted to an article by Dr. Morris in the British Year Book of International Law (1952), pp. 286 et seq., who has considered the American doctrine of divisible divorce. It is necessary on this matter to distinguish between the decree dissolving the marriage and any ancillary relief which may be claimed. The grounds for divorce are irrelevant so far as the status of the spouses is concerned and the fact that the wife received no notice of the proceedings does not affect this conclusion, as was rightly held in my opinion in *Boettcher* v. *Boettcher*[67] and *Igra* v. *Igra*.[68] Dr. Morris points out that if effective notice were necessary, the decree of divorce being analogous to a judgment in rem, great uncertainty in family relationship would result in cases where parties have remarried in reliance on a foreign decree, for if want of notice were a ground for contesting a foreign decree the defect could not be waived by the party who received no notice. The same considerations do not apply to orders for support or maintenance.

If the wife litigates the maintenance at the same time as the foreign divorce and fails, it is not to be expected that she will be permitted to relitigate the same question in the English courts. Such a case was *Mezger* v. *Mezger*,[69] which in my opinion was rightly decided upon that ground.

The New York Court of Appeal has held in *Lynn* v. *Lynn*[70] that the principle of *Estin* v. *Estin*[71] does not apply in a case where the wife participates in the Nevada divorce. When, however, the wife, as here, takes no part in the Nevada proceedings of which she was unaware, there is no obstacle of the particular kind which confronted the wife in *Mezger's* case[72] to the exercise of the discretion in her favour.

The court is, in my view, entitled to look at the grounds of the foreign divorce before deciding whether it is just to continue the existing maintenance order in her favour. I would, therefore, take a different view from the Divisional Court in *Mezger's* case[72] in so far as it criticized the justices for exercising their discretion by relying in part on the fact that the foreign divorce was pronounced on a ground not sufficient by English law.

---

[67] [1949] W.N. 83.

[68] [1951] P. 404; [1951] 2 T.L.R. 670.

[69] [1937] P. 19.

[70] (1951) 302 N.Y. 193; 97 N.E., 2d., 748.

[71] 334 U.S. 541.

[72] [1937] P. 19.

The Divisional Court ended its judgment in the present case[73]: "In our opinion, it is most important to avoid any "suggestion that effect is not being given to the foreign decree "because of the grounds on which it is based, or on the ground "that the substituted service was ineffectual, or that it is being "assumed, without any evidence of the foreign law, that the "husband's adultery or his desertion would be fatal according "to the foreign law to his obtaining a decree on the ground of a "three years' separation." Those considerations apply forcefully to the recognition of the foreign decree as affecting the status but do not conclude the matter, in my view, as regards rights in personam such as property rights of the wife which, as I have endeavoured to show, are subject to different considerations.

Accordingly, taking into account the wife's conduct throughout, the Nevada decree pronounced against her without effective notice and the ground of the decree, I am of opinion that the exercise of discretion under review is not open to criticism and I would allow the appeal.

Ormerod L.J. I agree. The first question to consider is the submission of Mr. Hawser that the case of *Bragg* v. *Bragg*[74] was wrongly decided, and that a decree of dissolution of marriage automatically puts an end to a maintenance order previously obtained by a wife under the Summary Jurisdiction (Married Women) Act, 1895. If he is right in this it is, of course, an end of the matter provided, and it is not here disputed, that the decree obtained in the State of Nevada is valid in this country. I agree with my brethren that this submission should not prevail, particularly having regard to the fact that *Bragg* v. *Bragg*[74] has been accepted as good law since 1925 and has been approved on more than one occasion by Lord Merriman P. sitting in the Divisional Court.

The question to be decided, therefore, is whether the magistrate was entitled to exercise his discretion as he did in refusing to discharge the order, having regard to the fact that the decree was a foreign one, and particularly having regard to the requirements of comity. Mr. Hawser argued that, assuming *Bragg* v. *Bragg*[75] was good law, its application should be limited to cases where the decree is obtained in this country. This argument, as I understand it, is based on the reasoning that the ratio decidendi of *Bragg* v. *Bragg* [75] was that it was a convenient and common-sense use of the machinery provided by the Summary Jurisdiction (Married Women) Act, 1895, in cases where there was the concurrent jurisdiction of the Divorce Court. I do not agree that this was the basis of the decision. It is true that the questions of common sense and convenience were discussed by the President [Sir Henry Duke P.] in relation, as I read his judgment, to the matters to be taken into account by the magistrate in the exercise of his discretion. But the case was decided on the proper construction of the Act and, in particular, of section 7. Sir Henry Duke P. said [76]: " On the whole, I think the appellant " was right in his original view that he must go to a court of " summary jurisdiction to get rid of this order, although there " had been a decree absolute for divorce, and it seems to me to " follow from that that if there were not the statutory grounds " of the discharge of the husband from his obligation under the " order, then before the appellant could succeed he must satisfy " the magistrate that justice required that the order should be " altered, varied, or discharged." In other words, that the magistrate must exercise his discretion.

---

[73] Ante, p. 267.

[74] [1925] P. 20.

[75] Ibid.

If this is the proper view to take of the decision in *Bragg* v. *Bragg* [77] then I see no reason why in a proper case it should not apply where a decree has been obtained in a foreign country. I have in mind that in *Kirk* v. *Kirk*,[78] where the wife obtained a decree in Scotland, her husband being domiciled there, it was held by the Divisional Court that the proper exercise of the magistrate's discretion was to discharge an order for maintenance previously obtained in this country and to leave the wife to pursue her relief in Scotland. But that was a case in which the wife herself instituted the Scottish proceedings and there was information before the Divisional Court of the relief available to the wife in Scotland if she cared to seek it. In his judgment in the Divisional Court in the present case [79] Collingwood J. pointed to the fact that there is no reported case in which an order has been maintained in favour of a wife against whom a decree has subsequently been granted, whether by an English or a foreign court. This may well be so, but it must be borne in mind that in this country, with only a very few exceptions, the wife against whom a decree has been granted is considered to be the guilty party. In the present case, so far as can be ascertained from the documents, no charge was made against the wife in Nevada, and the only ground upon which the marriage was dissolved was that the parties had not cohabited since 1949. My view in these circumstances is that the wife is in the same position as she would have been if her marriage had been dissolved in this country in proceedings in which she was an innocent party, and that, subject to the question of comity, the magistrate acted rightly in exercising his discretion as he did.

---

[75] [1925] P. 20.
[76] Ibid. 25.
[77] [1925] P. 20.
[78] [1947] W.N. 161.
[79] Ante, p. 266.

It appears from the last two paragraphs of the judgment of Collingwood J. that the Divisional Court was chiefly influenced in coming to its decision by the necessity of observing the principle of comity. Collingwood J. says[80]: "We do not think that it is "permissible to allow these considerations" (that is, the wife's position in relation to her husband's conduct) "to weigh against "the propriety of setting aside the order in light of the foreign "decree." And in the next paragraph he speaks of the importance of avoiding any suggestion that effect is not being given to the foreign decree on the various grounds there set out. It is, of course, essential that the principle of comity should be observed and that proper weight should be given to the decree of the Nevada court. But it appears that the question whether the Nevada decree should be regarded as of such effect that the only proper exercise by the magistrate of his discretion would be to put an end to the order requires careful consideration in the light of two cases in the United States of America which have been decided since this case was heard by the Divisional Court. In *Estin* v. *Estin*,[81] a decision of the Supreme Court, the spouses were originally domiciled in New York, where the wife obtained a decree of separation and alimony. Having acquired a domicile in Nevada the husband subsequently obtained a Nevada decree in proceedings of which the wife was notified constructively, which I suppose means, as in this case, by advertisement. The husband then stopped paying alimony on the ground of the Nevada decree and the New York courts, while upholding the Nevada decree as putting an end to the status of marriage, granted to the wife judgment for arrears of alimony on the ground that the decree had not put an end to the order of the New York court. The Supreme Court held that the judgment of the New York court did not deny "full faith and "credit" to the Nevada decree and so did not offend against article 4 (1) of the Constitution. The same principle appears to

---

[80] Ante, p. 267.

[81] 334 U.S. 541.

C. A.
1957

Wood
v.
Wood.

Ormerod L.J.

have been followed in *Vanderbilt* v. *Vanderbilt*,[82] a decision of the New York court dealing with an order for alimony made in New York, in accordance with a recent enactment, after a Nevada decree had been made dissolving the status of marriage. It does not appear from the report in *Estin's* case [83] whether the decree was in the same form as in the present case, but it certainly was so in the case of *Vanderbilt*.[84] The decree, after ordering that the marriage be dissolved, goes on to release the parties "from all obligations thereof." There is no indication that the question of alimony was ever raised in the Nevada court, indeed all the indications are to the contrary, nor was there any evidence before the magistrate or the Divisional Court of the effect of the decree on questions of alimony or as to whether there was any alimony or other relief available for a divorced wife in Nevada. It would seem that the position in *Estin* v. *Estin* [85] is very much the same as in the present case, and it is difficult under these circumstances to see why the decree of the Nevada court which admittedly put an end to her married status should be allowed to interfere with a personal right which the wife has in this country for maintenance under an order made in pursuance of a statute. If the course adopted in *Estin's* case [85] did not offend against the provision for "full "faith and credit," it would, in my view, be wrong to hold that the exercise of the magistrate's discretion in this case offended against the principles of comity. As was stated in the judgment of the court in *Estin's* case,[85] article 4 (1) of the Constitution substituted a command for the earlier principles of comity, and it seems likely that the requirements of "full faith and credit" would be more rather than less exacting than the requirements of comity. For these reasons the appeal should, in my opinion, be allowed and the orders of the magistrate restored.

Appeal allowed.
Order of the magistrate of February 7, 1950, *as varied by the magistrate on June* 21, 1956, *restored.*

Solicitors: *J. C. Clifford Watts; Tringhams.*

E. D.

---

[82] 1956, 1 N.Y., 2d., 342.

[83] 334 U.S. 541.

[84] 1956, 1 N.Y., 2d., 342.

[85] 334 U.S. 541.

TACZANOWSKA (*orse.* ROTH) *v.* TACZANOWSKI.

1956
May 14, 15,
16, 17, 29, 30;
June 1, 4;
Oct. 2, 8.

Karminski J.

C. A.

1957
May 27, 28;
June 6.

Hodson, Parker and Ormerod L.JJ.

Conflict of Laws—Marriage—Validity—Common law marriage—Forces abroad—Occupation of foreign territory—Polish forces in Italy—Marriage between Poles—"Discipline and internal administration"—Formalities not in compliance with lex loci celebrationis—Marriage valid at common law—Foreign Marriage Act, 1892 (55 *&* 56 *Vict. c.* 23), *ss.* 1 *and* 22, *as amended by the Foreign Marriage Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 33), *s.* 2—*Allied Forces Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 51), *s.* 1 (1)—*Polish Resettlement Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 19), *s.* 9 (2) (8).
Military Law—Allied forces—Polish resettlement.

A ceremony of marriage was performed between Polish nationals in Italy in 1946 by a Polish army chaplain according to the rites of the Roman Catholic Church. The husband was a member of Polish forces in Italy known as the Polish 2nd Corps. The relevant articles of the Italian civil code were not read over to the parties by the officiating priest, nor was the ceremony registered in the Italian civil register of marriage as required by Italian law. The requirements of the lex loci were accordingly not complied with. It was, however, accepted that the Italian law would recognize the validity of the marriage if it was valid by the national law of the parties at the time of the ceremony. By the Polish law of November 25, 1926, Polish army chaplains were given power to solemnize legal and valid marriage of military persons; but that power was abrogated by the Lublin Government (which was recognized by His Majesty's Government in July 1945); and by a decree of September, 1945, it was provided that the only valid form of marriage to be recognized by Polish law as from January 1, 1946, was one before a civil registrar.

The Lublin Government no longer considered Polish forces abroad as units of the Polish army after February 14, 1946; the Polish forces in Italy were stated by the Foreign Office to be forces in belligerent occupation of Italy both before and after that date:—

Held by the Court of Appeal, (1) that although section 22 of the Foreign Marriage Act, 1892,[1] was not limited by the preamble to the Act to marriages contracted by spouses of whom one was a British subject, it was not applicable because the Polish 2nd Corps was an independent command and the chaplain who performed the ceremony was not officiating under the orders of the commanding officer of a British army serving abroad.

---

[1] Foreign Marriage Act, 1892, s. 1: "All marriages between parties "of whom one at least is a British "subject solemnized in the manner "in this Act provided in any foreign "country or place by or before a "marriage officer within the meaning "of this Act shall be as valid in law "as if the same had been solemnized "in the United Kingdom with a due "observance of all forms required by "law."

S. 22 (1) (as amended by Foreign Marriage Act, 1947, s. 2): "A marriage solemnized in any foreign "territory by a chaplain serving with "any part of the naval, military or "air forces of His Majesty serving in "that territory or by a person authorized . . . by the commanding "officer . . . shall, subject as hereinafter provided, be as valid in law "as if the marriage had been solemnized in the United Kingdom with "a due observance of all forms "required by law: . . ."

(2) That the powers conferred by the Allied Forces Act, 1940, s. 1 (1),[2] were powers to be exercised within the United Kingdom and nothing in the Polish Resettlement Act, 1947,[3] enabled the court to say that by English law the marriage in question should be held to be valid.

(3) That at the material date the Polish land forces in Italy were forces in belligerent occupation of Italian territory and the principle laid down in *Scrimshire* v. *Scrimshire* (1752) 2 Hag. Con. 395 that parties entering into a marriage contract in a foreign country subjected themselves to have the validity of it determined by the laws of that country, did not apply to a contract performed in an occupied country by a member of the occupying forces; and that, there being no evidence that in 1946 the Allied Forces in Italy were in any way subject to the laws of that country, there was no reason why the validity of the marriage should be governed by the lex loci of Italy.

(4) That, since the marriage was celebrated before an episcopally ordained clergyman, it was valid at common law; that that was the law prima facie to be administered in the courts of England if the lex loci was inapplicable; and that the marriage was accordingly valid notwithstanding the foreign nationality and domicile of the parties at the date of the ceremony.

Savenis v. *Savenis and Szmeck* [1950] S.A.S.R. 309 applied.

Ruding v. *Smith* (1821) 2 Hag.Con. 371 considered.

Decision of Karminski J. reversed.

---

[2] Allied Forces Act, 1940, s. 1 (1): "Where any naval, military or "air forces of any foreign Power "allied with His Majesty are for the "time being present in the United "Kingdom or on board any of His "Majesty's ships or aircraft, the "naval, military, and air force courts "and authorities of that Power may, "subject to the provisions of this Act, "exercise within the United Kingdom "or on board any such ship or air"craft in relation to members of "those forces, in matters concerning "discipline and internal administra"tion, all such powers as are con"ferred upon them by the law of "that Power."

[3] Polish Resettlement Act, 1947, s. 9 (2): "Members of the said "[Polish] forces shall be under obli"gation to observe, in matters con"cerning their discipline and internal "administration, the rules in force as "to those matters under the law of "Poland on the first day of January, "1945 . . ."

S. 9 (8): "As respects any "period between the first day of "January, 1945 and the passing of "this Act, the powers conferred by "subsection (1) of section 1 of the "Allied Forces Act, 1940, shall be "deemed to have been exercisable in "relation to the said forces by "reference to the law of Poland in "force on that day and as if the said "forces had not ceased to be "recognized by the Government of "Poland, and any Order in Council "made under or by virtue of that "Act shall be deemed to have had "effect accordingly."

PETITION FOR DECREE OF NULLITY.

The following facts are taken from the judgment of Hodson L.J. in the Court of Appeal. The parties, Krystyna Roth, spinster, and Stanislaw Taczanowski, went through a form of marriage in the Parish Church of the Resurrectionists in Rome on July 16, 1946. They were Polish nationals, the bride being a civilian refugee who had been staying in a convent in Rome, and the bridegroom an officer in the Polish 2nd Corps, then serving in Italy, in the course of his military duties. The ceremony was performed by a Roman Catholic priest then serving as a Polish army chaplain. There was no question but that the parties intended to enter into marriage. They lived together until 1950, having from the early part of 1947 lived in England, where it was pleaded that they were domiciled at the time of the institution of the present proceedings by the wife on June 15, 1955, for a decree of nullity of marriage. In November, 1947, a child was born.

The wife's petition came before Karminski J.

J. E. S. Simon Q.C., *George Dobry* and *A. St. J. Davies* for the wife.

Harold Brown Q.C. and *N. H. Curtis-Raleigh* for the husband.

Roger Ormrod for the Queen's Proctor as amicus curiae.

The following cases were cited in argument in addition to those cited in the judgment: *Burn* v. *Farrar*[4]; *Ruding* v. *Smith*[5]; *Scrimshire* v. *Scrimshire*[6]; *Brook* v. *Brook*[7]; *Reg.* v. *Millis*[8]; *Warrender* v. *Warrender*[9]; *Wolfenden* v. *Wolfenden*[10]; *Starkowski* v. *Attorney-General*[11]; *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie*[12]; *In re Shephard*[13]; *Lazard Bros. & Co.* v. *Midland Bank Ltd.*[14]; *Kenward* v. *Kenward*[15]; *Rex* v. *Inhabitants of Brampton*[16]; *Waldegrave Peerage Case*[17]; *Robins* v. *National Trust*[18]; *Catterall* v. *Catterall*[19]; *Penhas* v. *Tan Soo*

---

[4] (1819) 2 Hag.Con. 369.

[5] (1821) 2 Hag.Con. 371.

[6] (1752) 2 Hag.Con. 395.

[7] (1858) 3 Sm. & G. 481.

[8] (1844) 10 Cl. & Fin. 534.

[9] (1835) 2 Cl. & Fin. 488.

[10] [1946] P. 61; 62 T.L.R. 10; [1945] 2 All E.R. 539.

[11] [1954] A.C. 155; [1953] 2 All E.R. 1272.

[12] (1881) 6 App.Cas. 364.

[13] [1904] 1 Ch. 456.

[14] [1933] A.C. 289; 49 T.L.R. 94.

[15] [1951] P. 124; 66 T.L.R. (Pt. 2) 157; [1950] 2 All E.R. 297.

[16] (1808) 10 East 282.

[17] (1837) 4 Cl. & Fin. 649.

[18] [1927] A.C. 515; 43 T.L.R. 243.

[19] (1847) 1 Rob.Ecc. 580.

Eng[20]; *Pertreis* v. *Tondear*[21]; *Alexander* v. *Jenkins*[22]; *Kent* v. *Burgess*[23]; *In re Amand.*[24]

Cur. adv. vult.

KARMINSKI J., reading his judgment, stated the facts and continued: The wife now alleges that the ceremony of marriage in Rome was null and void because it did not comply with the lex loci, namely, Italian law. It is alleged by her, and it is not denied by the husband, that articles 143, 144 and 145 of the Italian Civil Code were not read over to the parties by the officiating priest. Further, the ceremony of marriage was not registered in the Italian civil register of marriage as required by Italian law. It is conceded by the wife that Italian law would nevertheless recognize the validity of the marriage, if such marriage was valid by Polish law, since Polish law was at the material date the national law of both spouses. But it is said by the wife that by the Polish Matrimonial Law of 1945, which came into force on January 1, 1946, a religious ceremony of marriage had no force or effect in law and was, in short, no marriage at all.

The husband, by his answer, asserts that the ceremony of marriage was valid and subsisting. He contends that the Polish law of November 25, 1926, authorizing army chaplains to marry military personnel, was still in force so far, at any rate, as Polish troops in Italy in 1946 were concerned. Further, the husband contended that if Polish law governed the marriage, it was an act of internal administration within section 1 (1) of the Allied Forces Act, 1940. The husband has charged the wife with adultery and desertion; but by an order dated February 21, 1956, it was directed that the issue of nullity be tried first before the issues of adultery and desertion. I have had no evidence on the cross-charges made by the husband.

I desire to say at the outset of this case that there can be no doubt that when the ceremony of marriage was performed in 1946 the parties desired to be lawfully married and at that time entertained no doubt as to the validity of the ceremony then performed. Both parties were Roman Catholics and the ceremony was performed by a Roman Catholic priest. Mr. Brown, for the husband, rightly emphasized the heavy burden which must lie on a petitioner alleging that such a marriage is invalid. The law presumes, unless the contrary be clearly proved, that where a man and woman are proved to have lived together as man and wife, they were living together in consequence of a valid marriage and not in a state of concubinage: see *Sastry* v. *Sembecutty*,[1] where the earlier authorities were considered. To repel the presumption in favour of a valid marriage a mere balance of probabilities will not suffice. The evidence must be clear and conclusive: see *Piers* v. *Piers*.[2] I approach this case, therefore, fully conscious of the presumption in favour of the validity of a marriage entered into under the circumstances which I have briefly set out. I must now consider the matters which have been raised as impugning the validity of this marriage.

---

[20] [1953] A.C. 304.

[21] (1790) 1 Hag.Con. 136.

[22] [1892] 1 Q.B. 797; 8 T.L.R. 421.

[23] (1840) 11 Sim. 361.

[24] [1941] 2 K.B. 239.

Where formalities are concerned, English law looks to the lex loci. This marriage was celebrated in Italy and I must look therefore first to the requirements of Italian law. Dr. Nissim, a doctor of law of the University of Florence and a member of the Italian Bar, made it perfectly clear that this ceremony of marriage was by Italian law no marriage at all. The defects were twofold: first, the officiating priest failed to read to the parties articles 143, 144 and 145 of the Italian code, and, secondly, the marriage was not registered with the Italian civil registrar as required by Italian law. Dr. Nissim also pointed out that Italian law provides an exception in the case of two foreigners marrying in Italy according to the law of their common nationality. He agreed, therefore, that if the formalities of this ceremony of marriage were valid by Polish law, then it would be recognized as valid by Italian law. Dr. Nissim summarized his views in answer to the following question put to him in re-examination by Mr. Simon: "If [the "Italian court] finds that neither Italian law has been complied "with nor the national law of the two parties so far as "formalities are concerned, what judgment will it pronounce "on the validity of the marriage?" Answer: "They will "pronounce that there is no marriage according to Italian law."

I now turn to the requirements of Polish law as to formalities. It is not, in my view, necessary to make a critical examination of the Polish law of marriage before January 1, 1946. It is sufficient to observe that earlier partitions of Poland had left their mark on the personal law, and that prior to January 1, 1946, no less than four systems of law operating on a territorial basis determined the nature of the formalities of marriage. For the purposes of this case it is sufficient to refer to the law of November 25, 1926, concerning the ecclesiastical organization of the Army clergy. By section 13 of that law, army chaplains had power to solemnize legal and valid marriages of military persons. I am satisfied that such power extended beyond the then territorial limits of the Polish Republic, and to places wherever there were Polish troops and Polish chaplains. Before July 5, 1945, the position of the Polish armed forces so far as His Majesty's Government was concerned was defined " as the Armed Forces of the Republic of " Poland allied with the United Kingdom ": see article 1 of the Anglo-Polish agreement of August 5, 1940.

---

[1] (1881) 6 App.Cas. 364, 371–372.

[2] (1849) 2 H.L.C. 331.

On July 5, 1945, His Majesty's Government recognized as the Government of Poland the Polish Provisional Government of National Unity, sometimes more shortly described as the Lublin Government. By a decree of September 15, 1945, the Lublin Government introduced a new matrimonial law with effect from January 1, 1946. That law provided a uniform matrimonial law for the whole of Poland, and at the same time provided that the only valid form of marriage was one before a civil registrar. No other form of marriage in Poland was thereafter recognized by Polish law. The power of army chaplains to perform marriages conferred on them by the law of 1926 was abrogated by article 1 of the Introductory Provisions to the Law on Documents of Civil Status. By a Note dated February 14, 1946, from the Polish Ministry of Foreign Affairs to His Majesty's Government, the Lublin Government stated that as from that date the Polish forces abroad could no longer be considered as units of the Polish army.

Professor Kuratowski, a member of the Polish and of the English bars, expressed the view that the effect of the law of September, 1945, would take away from chaplains the right to perform any valid marriage ceremony. Professor Kuratowski in cross-examination agreed that Polish law still looks at the lex loci in cases where Polish citizens marry abroad. It was suggested to him that a marriage celebrated abroad could cure a breach of the lex loci by registration in Poland, but he expressed the view, which I accept, that the provisions for registration in the 1945 law are to deal with cases where registration has been impracticable, and not to create a new marriage from a void marriage.

On behalf of the husband Dr. Bloch gave evidence as to Polish law. Dr. Bloch has had long experience at the Polish Bar prior to 1939, and subsequently as a legal adviser to the Polish forces. Dr. Bloch expressed the view that article XI of the Introductory Provisions to the Law on Documents of Civil Status contained some kind of dispensation which would save this marriage. In his view, article XI was to cover the administrative gap between January, 1946, and such time as sufficient staff and offices could be found to perform civil marriages. Meanwhile, the former ecclesiastical authorities could continue to perform marriages. Article XI commences with the words: "In those "parts of the State," and Dr. Bloch agreed that these words referred only to the territory of Poland. But Dr. Bloch maintained that a Polish judge would, or at any rate should, by analogy apply the provisions of article XI to marriages of Poles abroad and, in particular, to a case of this kind where Polish military personnel would prefer to be married by their own chaplains rather than by an Italian priest or registrar. I am bound to say that in my view I thought Dr. Bloch's suggestion was more ingenious than convincing. It is difficult to see how the analogy suggested could apply when the power of army chaplains to celebrate marriages had been expressly cancelled by the same Introductory Provisions. Further, it was never suggested that Polish military personnel in Italy were unable to enter into a marriage valid by Italian law in a Roman Catholic church, provided always that the required sections of the Italian civil code were read over and the marriage duly registered with the Italian civil authorities. Finally, Dr. Bloch agreed with Mr. Simon that this marriage was invalid according to Polish law, except so far as it was saved by article XI of the Introductory Provisions. Professor Kuratowski was recalled to express his opinion on Dr. Bloch's theory of analogy. He expressed the view without hesitation that the Polish chaplains had lost their authority to celebrate marriages under Polish law either in Poland or elsewhere, and that, in any event, article XI was concerned only with Polish territory and not with Poles who were abroad. In answer to a question in cross-examination by Mr. Brown, Professor Kuratowski said: "There is no place to apply any kind "of analogy, it is a very simple question." I agree entirely with both branches of this answer and am unable to accept Dr. Bloch's theory of analogy.

In my view, therefore, this ceremony of marriage was invalid both by Italian law and by Polish law existing at the time of the ceremony. That it was performed in good faith by the officiating chaplain I have no reason at all to doubt. Indeed, it is at least very probable that the new Polish Law of 1945 was not communicated to the Polish Command in Italy and was, therefore, in 1946, unknown to the chaplains to that army.

1956

TACZANOWSKA (orse. ROTH) v. TACZANOWSKI.

Karminski J.

Considerations of Italian and Polish law do not, however, conclude the matter. Mr. Brown, for the husband, relied on the Polish Resettlement Act, 1947, as affording him a statutory basis in English law for asserting a valid marriage. Mr. Brown relied particularly on section 9 of the Polish Resettlement Act, 1947, which contains provisions for the discipline and internal administration of certain Polish forces. He argued that the words "internal administration" include the power of regulating the formalities of marriages in which one or both of the parties were members of the Polish Armed Forces. In particular he relied on section 9 (8) which provides: "As respects any period between "the first day of January, 1945 and the passing of this Act, the "powers conferred by subsection (1) of section 1 of the Allied "Forces Act, 1940, shall be deemed to have been exercisable in "relation to the said forces by reference to the law of Poland in "force on that day and as if the said forces had not ceased to be "recognized by the Government of Poland, and any Order in "Council made under or by virtue of that Act shall be deemed "to have had effect accordingly." In Mr. Brown's submission, the words "said forces" relate to the forces set out in section 1 (1) of the Act.

Both limbs of Mr. Brown's submission require examination. Mr. Ormrod, for the Queen's Proctor, agreed that "internal "administration" includes matters affecting the celebration and registration of marriage. Mr. Simon, for the wife, contended for a narrower meaning and submitted that the celebration and registration of marriage could not be matters of internal discipline. The industry of counsel failed to find any authority in which the meaning of these words have been judicially discussed; nor do I find it easy to decide the precise extent of the sphere of internal administration in a military body.

I have looked both at the Queen's Regulations for the Army, 1955, and Queen's Regulations and Admiralty Instructions, 1953, in order to ascertain the regulations concerning marriage in Her Majesty's Forces. Paragraphs 1682 to 1695 inclusive of the Queen's Regulations for the Army deal, inter alia, with the steps to be taken before marriage and its subsequent registration. Queen's Regulations and Admiralty Instructions are somewhat more extensive, and paragraphs 4441 to 4488 inclusive contain detailed instructions on such matters as banns and notice of marriage, marriages abroad and registration of marriage. Mr. Ormrod also called my attention to the provisions of the Visiting Forces Act, 1933. Section 8 of that Act provides that "internal "administration" in relation to any visiting force includes the "administration of the property of a deceased member of the "force." From that provision Mr. Ormrod submitted that it was clear that internal administration required the application of the personal law of the State in which a deceased member of a visiting force was domiciled for the purposes of administering his estate. So far as the Polish forces in England were concerned, an order issued on June 13, 1941, by the Commander-in-Chief and Minister for Military Affairs dealt in some detail with the duty of chaplains in regard to documents of civil status. Under paragraph 5 of that order it was specifically directed that the chaplains should ensure that the provisions of civil law in force in the United Kingdom be strictly adhered to, in particular with regard to marriages.

I have come to the conclusion that regulations as to the formation and registration of marriage are matters of internal discipline within the meaning of section 9 (2) of the Polish Resettlement Act, 1947. To exclude matters affecting marriage from internal administration would, in my view, be giving too narrow a meaning to these words having regard to the complex organization of any modern military formation, especially when serving abroad. Though Mr. Ormrod was in agreement with Mr. Brown on the meaning of internal administration, he argued that the Polish Resettlement Act was of no assistance to the husband because of the provisions of section 1 of the Allied Forces Act, 1940.

Section 1 (1) of that Act provides as follows: "Where any "naval, military or air forces of any foreign Power allied with "His Majesty are for the time being present in the United "Kingdom or on board any of His Majesty's ships or aircraft, "the naval, military and air force courts and authorities of that "Power may, subject to the provisions of this Act, exercise "within the United Kingdom or on board any such ship or "aircraft in relation to members of those forces, in matters con- "cerning discipline and internal administration, all such powers "as are conferred upon them by the law of that Power."

It is clear that apart from those on board His Majesty's ships or aircraft the Act is limited to those for the time being present in the United Kingdom. But Mr. Brown contended that the words "said forces" in section 9 (8) of the Polish Resettlement Act referred to the forces mentioned in section 1 (1) of the same Act. I am, however, satisfied that Mr. Ormrod's argument, which was supported by Mr. Simon, is correct and that the reference to "the said forces" in section 9 (8) of the Polish Resettlement Act, 1947, relates to the forces defined in section 1 (1) of the Allied Forces Act, 1940. I do not think, therefore, that the Polish Resettlement Act, 1947, validates the present marriage.

It was further argued by Mr. Ormrod and by Mr. Brown that this marriage was a valid marriage by reason of the provisions of the Foreign Marriage Acts, 1892–1947. It is true that the Foreign Marriage Act, 1892, limits the application of that Act to marriages between parties of whom one at least is a British subject. But it was contended by Mr. Ormrod that section 22 of the Act of 1892, now replaced by section 2 of the Act of 1947, was not so limited, since it dealt with marriages within the British lines and not with marriages before consular or other civilian officers. Mr. Ormrod rightly emphasized that marriage within the lines had been given statutory recognition in 1823,[3] and suggested that it had been re-enacted in 1892 in order to complete the statute law governing foreign marriages; but I can see nothing in either the Act of 1892 or 1947 which takes marriages within the lines outside the limitations of section 1 of the Act of 1892. Nor do I think that the historical approach supports Mr. Ormrod's argument, since the preamble to the Act of 1823 describes it as "an Act to relieve His Majesty's subjects from "all doubt concerning the validity of certain marriages solemnized "abroad." In the present case neither of the parties were at the time of the ceremony of marriage British subjects, and in my view the provisions of the Foreign Marriages Acts, 1892–1947, do not apply to this case.

I do not think, therefore, that it is necessary to decide the more difficult question whether the chaplain who performed the ceremony in this case was a chaplain operating under the orders of the commanding officer of a British army serving abroad. It is true that in 1946 the Polish Corps in Italy was supplied and paid through British military channels, and was for strategic, and perhaps for tactical, purposes under the orders of the British military Commander-in-Chief. General Kopanski, who was Chief of Staff of the Polish Forces from 1943–1945, expressed the view in evidence that General Anders, in command of the Polish 2nd Corps, was under the operational command of the Allied 8th Army but was completely autonomous as a corps commander. The chaplains of the Polish 2nd Corps were under the orders of their own unit commanders at the various levels, and ultimately under the orders of General Anders himself. General Kopanski thought that the British Commander-in-Chief could in terms have given General Anders orders in respect of the Polish chaplains. I do not think that this somewhat remote, and perhaps hypothetical, control could amount to the Polish chaplains officiating under the orders of the commanding officer of a British Army serving abroad. But as it is not now necessary for me to decide this point, I prefer merely to express my doubts and difficulties on this point.

---

[3] 4 Geo. 4, c. 91, finally repealed by the Act of 1892.

There remains Mr. Ormrod's last, and perhaps most interesting point in support of the validity of this marriage. He argued that where a marriage takes place in a country occupied by a belligerent army, the requirements of the lex loci in point of form no longer applied. In this case, it was contended, the husband was a member of the occupying force and therefore exempt from the requirements of the lex loci. The precise status of the Polish 2nd Corps in Italy was the subject of a question agreed by counsel and submitted with others to the Foreign Office for answer. The answer of the Foreign Office was that both before and after February 14, 1946, the Polish Land Forces in Italy were forces in belligerent occupation of Italian territory. Mr. Simon submitted that the meaning of that answer was a matter of law for the court to decide. I do not think that the Foreign Office answer (taken in conjunction with another answer as to the position in Italy of the British Land Forces) means more than this: that the Allied Forces having fought their way by force of arms into Italy in 1943, were still there under arms in 1946, and indeed remained there until the conclusion of the peace treaty with Italy in September, 1947.

In my view it is sufficient to accept that the husband here was at the time of the ceremony of marriage a member of a military force in occupation of a foreign State. The position of such persons with regard to the formalities of marriage has always been recognized by English law as one which may need special consideration.

A number of authorities were cited by counsel, but it is sufficient to refer to the judgment of Lord Stowell in *Ruding* v. *Smith*.[4] Lord Stowell pointed out[5] the inconvenience and hardship which might be caused by compelling the conqueror to submit to the laws of the conquered. In the particular circumstances of that case it appeared to be impossible for the parties to be married by Dutch law, and they were married under a licence from the British Governor by the chaplain of the English garrison, the husband being himself in transit to the East Indies in the course of his military duties. Lord Stowell found[6] in favour of the validity of the marriage and based his decision on (1) the distinct British character of the parties; (2) their independence of Dutch law in their own British transactions; (3) the insuperable difficulties of getting married by Dutch law; (4) the countenance given by British authority to the marriage in a country then under British dominion.

---

[4] (1821) 2 Hag.Con. 371.

[5] Ibid. 381.

It will be observed that Lord Stowell placed great emphasis on the national, that is, the British, side of the transaction; but I do not find in his judgment anything which would indicate that he would of necessity have refused to have taken the same view in the case of a foreigner.

/ There can be no doubt in the light of the decided cases that when a marriage by the lex loci is impossible, or at least objectionable to the conscience, a marriage in common law form will be recognized by the courts of this country.

The principle, which arose in many cases from settlers and colonists going to new and undeveloped countries, was stated as follows by Sir T. Erskine Perry C.J. (Supreme Court of Bombay) in *Maclean* v. *Cristall*[7]: "The rule in such case is, that although "colonists take the law of England with them to their new home, "they only take so much of it as is applicable to their situation "and condition."/ It will be observed that the principle as there stated refers to the law of England, and not to any other municipal law. But assuming that the parties have brought their personal law with them, it would be Polish and not English law; and for the reasons given above, this form of marriage would not be recognized as valid by Polish law as it stood at the time of the ceremony.

Mr. Ormrod contended that the Polish 2nd Corps was at the time of the ceremony of marriage a de facto part of the British Forces in Italy, and that, having been disowned by the Lublin Government, had become mercenaries hired by His Majesty's Government. Whatever the position of the Polish 2nd Corps at the time of this ceremony may have been, I am at least satisfied on the evidence that it was not an integral part of the British Armed Forces in Italy. But even if the members of the Polish

---

[6] 2 Hag.Con. 371, 388–394.

[7] (1849) 7 Notes of Cases, Suppl. 17, 24–25.

2nd Corps were in the position of foreigners serving in the British Forces, I apprehend that their personal law would remain that of their domicile, namely, Polish. It is not, therefore, necessary to examine the view expressed by a number of writers on this subject, that the common law form of marriage is available only to parties domiciled in England: see Schmitthoff, The English Conflict of Laws, at p. 322.

During the argument Mr. Simon called my attention to *Savenis* v. *Savenis and Szmeck*.[8] There the husband, a Lithuanian who had been a prisoner of war in Germany, went through a ceremony of marriage in November, 1945, in Germany, before a Roman Catholic priest. By German law at that time only a civil ceremony before a registrar could create a valid marriage. But it was found that at that time no registrars of marriages were available, nor was there any official to record a valid marriage. In a considered judgment Mayo J. held that the marriage was valid, notwithstanding the defects in form under German law, on the grounds that a marriage in accordance with the lex loci was at the time impossible and that the court could have recourse to the law of the husband's domicile, namely, Lithuania. Mayo J. based his decision on the principle that where a marriage cannot be lawfully solemnized owing to local conditions at the time, then it may be right to extend the area of legal recognition given to marriages that conform to our own common law. Mr. Simon argued that this decision is wrong. I prefer to distinguish that decision on the facts, without expressing a view as to its correctness. In *Savenis* v. *Savenis and Szmeck*[9] Mayo J. found as a fact that a marriage according to the forms required by the lex loci was impossible. In the present case there was no obstacle to the performance in 1946 of a valid ceremony of marriage between Poles in Italy according to the Roman Catholic rites. There was certainly no insuperable difficulty, indeed no difficulty of any kind, in the celebration at that time and place of a marriage valid by Italian law.

One further case requires brief consideration. In *Pilinski* v. *Pilinska*[10] the husband went through a ceremony of marriage with the wife in Germany in August, 1946. The ceremony was performed by the regimental chaplain at a Roman Catholic church in Germany. Both parties were of Polish nationality, the husband at that time serving with the Allied Forces in Germany. At the time of the ceremony of marriage German law required a civil marriage before a registrar; no other form of marriage was valid. A German decree of August, 1948, enabled ceremonies of marriage of this kind to be validated if duly registered before December 31, 1950, but no attempt had been made to register this ceremony. Mr. Commissioner Latey Q.C., in a considered judgment, held [11] that the religious ceremony was not effective to create a valid marriage. He based his decision on the well known principle of *Berthiaume* v. *Dastous*,[12] that subject to certain exceptions the validity of a foreign marriage is governed as to form by the lex loci celebrationis. In *Pilinski* v. *Pilinska* [13] there was no suggestion that in August, 1946, a civil marriage was impossible or impracticable. The wife, who was represented by counsel, did not oppose the petition, with the result that that case was not so fully argued as the present one. Nor does it appear that *Savenis* v. *Savenis and Szmeck* [14] was brought to the commissioner's notice.

---

[8] [1950] S.A.S.R. 309.

[9] Ibid. 310.

[10] [1955] 1 W.L.R. 329; [1955] 1 All E.R. 631.

I am therefore left in this position. There can be no doubt that the parties to this suit went through a ceremony of marriage in Rome not only with the desire of entering into a valid marriage, but in the belief that the ceremony was effective. The presumption in favour of a valid marriage is, as I have pointed out earlier in my judgment, a very strong one. But the presumption, though strong, may be rebutted, and must indeed fail before compelling evidence the other way. For the reasons set out in this judgment I have come to the conclusion, though with very considerable reluctance, that the ceremony of marriage celebrated between the petitioner and the respondent on July 16, 1946, must be declared to be null and void; and I pronounce a decree nisi of nullity accordingly.

Decree nisi of nullity.

J. B. G.

The husband appealed.

A. St. J. Davies, who had appeared as junior counsel for the wife at the trial below, said that she no longer wished to oppose the appeal. He took no part in the proceeding.

Harold Brown Q.C. and *N. H. Curtis-Raleigh* for the husband. The sole issue before Karminski J. was that of nullity. The questions are: (1) Was the marriage good by Italian law? (*a*) was it performed according to Italian ceremonies? (*b*) was it valid

[11] [1955] 1 W.L.R. 329, 330.

[12] [1930] A.C. 79; 45 T.L.R. 607.

[13] [1955] 1 W.L.R. 329.

[14] [1950] S.A.S.R. 309.

under the Polish law? (2) Was it valid under the Polish Resettlement Act, 1927? (3) Was it valid under the Foreign Marriage Acts, 1892 and 1947? (4) Is it valid as being a good common law marriage? Undisputed evidence was given by the Italian expert called on behalf of the wife that the forms and ceremonies required by Italian law had not been followed and that certain articles had not been read and the marriage had not been registered. But in cross-examination the witness admitted that if it was a valid marriage it could have been registered at any time. If the marriage had been contracted before January 1, 1946, it would have been valid under the Polish law of 1926, and therefore valid by Italian law. At the date of the marriage, however, under the communist Government of Poland, known as the Lublin Government, marriage in that country had become a purely secular ceremony, and the powers of the Roman Catholics to register were repealed. That new law was unknown to the Polish chaplain who officiated. It is submitted that in such a case as this, where neither of the experts called had had any experience of the Polish courts and of the law under the communist régime, since the commencement of the war, an English judge is placed in very great difficulty when he has before him two experts giving opposing views. The Polish law of 1926, which was operative until January, 1946, had been made according to a concordat between the Polish Government and the Vatican, and the new law of September, 1945, was a repudiation of that agreement. It is to be doubted whether the Italian courts would have rejected a Roman Catholic marriage, conducted in accordance with a concordat between Poland and the Holy See, which had been repudiated by an unilateral decision of the Lublin Government. The judge below has held that the words "the said forces" in section 9 (8) of the Polish Resettlement Act, 1947, do not refer to section 1 (1) of that Act but to section 1 (1) of the Allied Forces Act, 1940. It is submitted that they must refer to the Act of 1947. The powers of the Polish Army chaplain are to be construed according to the pre-Lublin law.

[PARKER L.J. The powers to be deemed to be exercisable must be (*a*) and (*b*) of section 1 of the Allied Forces Act, but they are only powers exercisable in the United Kingdom.]

It would be absurd if these powers were exercisable only in the United Kingdom. One could have a chaplain exercising the same powers in the United Kingdom and in Italy. One would be valid and the other invalid. Section 2 of the Foreign Marriage Act, 1947, replacing section 22 of the Act of 1892, deals with

C. A.
1957

TACZANOWSKA (*orse.* ROTH) *v.* TACZANOWSKI.

marriages celebrated within the British lines by any chaplain or officer or other person officiating under the orders of the British army commander serving abroad. The judge held that this section did not avail the husband because the Act of 1892 only applied where one of the parties was a British subject. Professor Dicey, in his Conflict of Laws, 2nd ed., p. 623, does not hold that the Act is confined to marriages where one party is of British nationality. Such marriages were given statutory recognition in 1823 by 4 Geo. 4, c. 91, which would appear to be declaratory of the common law and is not confined to British subjects. Section 22 of the Act of 1892 must be read by itself. The officiating officer must be under the overhead control and direction of the commander-in-chief, and thus one has indication that the Polish forces are part and parcel of the British forces. The Polish force, 2nd Corps, was part of the 8th Army. It is inconceivable that if the British commander forbade any marriage to be celebrated he would not have been obeyed. It must have been the intention of Parliament to regularize the position of this large Polish force. [Reference was made to *Piers* v. *Piers* [1]; *Sastry* v. *Sembecutty Vaigalie* [2]; *Lloyd* v. *Petitjean*,[3] and *Waldegrave Peerage Case*,[4] and to Visiting Forces Act, 1933, ss. 1, 8 (1); and the Queen's Regulations, 1955 ed.]

Roger Ormrod for the Queen's Proctor as amicus curiae. The question is whether or not the court will recognize this marriage as valid. That is a question which must be determined finally by the principle of English law. Fundamentally the principle of English law is to judge the marriage in the light of the lex loci principles. Except for one or two exceptions, that is the binding and rigid English law. A marriage which is bad by the lex loci is not recognized. If this marriage is not to be judged by the lex loci, the question is by what law is it to be judged? Will this court, while holding that a marriage between British subjects is valid, hold that a marriage between foreigners is invalid. "Common law marriage" is a misnomer. They were "canon "law" marriages: see *Reg.* v. *Millis.*[5] This court is not called upon to declare this marriage invalid by reason of an amendment of the Polish law. It is free, in the absence of any authority and in the absence of the lex loci principle, to decide by which law it will judge this appeal. It is submitted that once the lex loci is got rid of, the case must be decided according to the canon law, which is the law of England.

---

[1] (1849) 2 H.L.C. 331.
[2] (1881) 6 App.Cas. 364.
[3] (1839) 2 Curteis 251, 259.
[4] (1837) 4 Cl. & Fin. 649.
[5] (1844) 10 Cl. & Fin. 534.

There is no question but that this Polish force formed part of the army which was in belligerent occupation of Italy. The principle laid down in *Scrimshire* v. *Scrimshire*[6] that parties entering into a marriage contract in a foreign country subjected themselves to the laws of that country does not apply to a contract performed in an occupied country by a member of the occupying forces. In *Ruding* v. *Smith*[7] Lord Stowell pointed out the inconvenience and hardship which might be caused by compelling the conqueror to submit to the laws of the conqueror. This marriage, though contracted in an Italian church, was not subject to Italian laws and the lex loci had no application. The common or canon law must therefore be applied and the marriage declared valid: see decision of Mayo J. in *Savenis* v. *Savenis*.[8]

[The following authorities were also cited: *Pertreis* v. *Tondear*[9]; *Dalrymple* v. *Dalrymple*[10]; *Wolfenden* v. *Wolfenden*[11]; *Maclean* v. *Cristall*[12]; *Burn* v. *Farrar*[13]; *Rex* v. *Inhabitants of Brampton*.[14]]

1957. June 6. The following judgments were read.

HODSON L.J. stated the facts and continued: The petitioner alleged that the ceremony was null and void because in form it did not comply with the lex loci, namely, Italian law. She relied upon the rule established by the decision of Sir Edward Simpson, sitting in the Consistory Court of London, in *Scrimshire* v. *Scrimshire*.[1] The principle is there clearly stated that in administering the law of this country the rights of the parties are to be determined by our law which applies foreign law in such a case, since by entering into the marriage contract in another country the parties subject themselves to have the validity of the contract determined by the laws of that country.

In *Middleton* v. *Janverin*[2] Sir William Wynne referred to this case in these words: "I also remember to have heard that "that judgment was founded on great deliberation, and that "Lord Chancellor Hardwicke was consulted on it." Lord Dunedin, giving his advice in the Privy Council in *Berthiaume*

---

[6] (1752) 2 Hag.Con. 395.
[7] (1821) 2 Hag.Con. 371.
[8] [1950] S.A.S.R. 309.
[9] (1790) 1 Hag.Con. 136.
[10] (1811) 2 Hag.Con. 54.
[11] [1946] P. 61.
[12] (1849) 7 Notes of Cases Suppl. 17.
[13] (1819) 2 Hag.Con. 369.
[14] (1808) 10 East 282.
[1] (1752) 2 Hag.Con. 395.
[2] (1802) 2 Hag.Con. 437, 446.

v. *Dastous*,[3] said: "If the so-called marriage is no marriage in "the place where it is celebrated, there is no marriage anywhere, "although the ceremony or proceeding if conducted in the place "of the parties' domicile would be considered a good marriage." Thus, so far as forms and ceremonies are concerned, the general rule is that where parties contract marriage in a country other than their own, they are taken to subject themselves to the law of that other country.

The wife contended that the law of Italy regulating form had not been complied with. It was conceded that the municipal law of Italy had not been followed in that articles 143, 144 and 145 of the Civil Code were not read over to the parties by the officiating priest, and in that the ceremony was not registered in the civil register of marriage as required by Italian law. Italian law would, however, according to article 226 of the General Provisions preliminary to the Italian Civil Code, recognize the validity of the marriage if it was valid by Polish law; since that was at the material date the national law of both spouses.

By the old law of Poland prior to the establishment of the Lublin Government the marriage would have been valid. The relevant law, which concerned the ecclesiastical organization of the Army clergy, was passed on November 25, 1926, pursuant to a concordat between the Holy See and the Republic of Poland and extended beyond the limits of the Republic to places where there were Polish troops and chaplains. Under the heading "Jurisdiction of the Army Clergy," point 10 reads: "The Field "Bishop shall exercise jurisdiction in respect of chaplains, all "military persons and their families of catholic denomination "in the land forces and navy of the Republic of Poland." Point 13: "With regard to the administering of the Blessed "Sacrament of Marriage, the chaplain who has parish jurisdiction shall (a) publish the banns of the marriages of the military "persons and their families (under his care); (b) solemnize legal "and valid marriages of military persons and their families "within his parochial jurisdiction." Under the heading of "Keeping of Parish Registers," point 20 reads: "Army "chaplains shall discharge the duties of 'civil registrars' with "regard to military persons and their families according to the "regulations made by the Field Bishop's Curia."

On July 5, 1945, His Majesty's Government recognized the new Government of Poland, the so-called Lublin Government, and Dr. Nissim, an Italian lawyer who gave evidence, stated that in his opinion the same recognition had been accorded by the Government of Italy before the marriage of the parties. On September 25, 1945, the Lublin Government introduced a new matrimonial law, with effect from January 1, 1946, which provided that only a marriage contracted before an official of civil status should be valid in the eyes of the State. By article 1 of the Introductory Provisions it was provided that all previous provisions dealt with by the national law should cease to have effect and point 20 of the Statute of November 28, 1926, was expressly repealed. By a note dated July 14, 1946, the Polish Ministry of Foreign Affairs stated that as from that date the Polish forces abroad could no longer be considered units of the Polish Army.

---

[3] [1930] A.C. 79, 83; 45 T.L.R. 607.

I agree with the reasoning of the judge and with his conclusion, having heard evidence from eminent Polish lawyers, when he found, notwithstanding an ingenious theory put forward by Dr. Block in support of the marriage, that there was no escape from the finding that by Polish law the ceremony of marriage in question was invalid. Professor Kuratowski, whose evidence was accepted, was emphatically of this opinion. This conclusion of fact is not affected by a doubt expressed by an Italian lawyer, who, under cross-examination, doubted whether the Italian courts would recognize a law passed by way of unilateral repudiation of a concordat with the Holy See.

Reliance was placed on section 22 of the Foreign Marriage Act, 1892, in order to save the marriage. I cannot, however, agree that this section avails the appellant husband. [His Lordship read the section and continued:] It is true that section 22 of the Act of 1892 is not limited in terms to marriages between parties of whom at least one is a British subject. It re-enacted 4 George IV, c. 91, section 1, which reads: "Be it "declared and enacted . . . that all such marriages as aforesaid "shall be deemed and held to be as valid in law as if the same "had been solemnized within His Majesty's dominions, with "a due observance of all forms required by law." The preamble was: "Whereas it is expedient to relieve the minds "of all His Majesty's subjects from any doubt concerning the "validity of marriages solemnized by a Minister of the Church of "England in the chapel or house of any British Ambassador or "Minister residing within the country to the court of which he is "accredited, or in the chapel belonging to any British factory "abroad, or in the house of any British subject residing at such

C. A.
1957

Taczanowska (orse. Roth) v. Taczanowski.

Hodson L.J.

"factory, as well as from any possibility of doubt concerning the "validity of marriages solemnized within the British lines by "any chaplain or officer, or other person officiating under the "orders of the commanding officer of a British Army serving "abroad."

That statute is on the face of it of similar general application. In my opinion the construction of the section is not limited by the preamble to marriages contracted by spouses of whom one was a British subject. Professor Dicey was of this opinion (see Conflict of Laws, 2nd ed., p. 623), although other learned writers have taken a different view. This construction is, I think, supported by contrasting the language of 4 George IV, c. 91, with an earlier statute passed in the same reign, 4 George IV, c. 67, dealing with marriages of British subjects in the factory of St. Petersburgh. There the reference is to marriages of British subjects. Further, it would seem anomalous that while aliens may serve in the British Forces, they should not have the privileges conferred by the section.

The difficulty lies in the words "chaplain or officer, or other "person officiating under the orders of the commanding officer "of a British Army serving abroad." To my mind, upon the evidence, the Polish 2nd Corps was an independent command and the chaplain who performed the ceremony between the parties cannot truly be regarded as officiating under the orders of the commanding officer of a British army serving abroad. He was acting under the orders of his own Field Bishop, who in turn acted under the direction of the Polish Commander, General Anders. Moreover, the Polish Commander-in-Chief, General Sikorski, had in 1941 given instructions as to, inter alia, "the "keeping of registers and the issue of certificates of marriage." I agree with the view tentatively expressed by the judge that the fact that the Polish 2nd Corps was under the operational command of the Allied 8th Army is too remote to justify the court in holding that this ceremony is valid under section 22 of the Foreign Marriage Act, even though that Corps had by the time of the ceremony been disowned by the Polish Government.

It was argued here and below, however, that the Polish Resettlement Act of 1947 affords a statutory basis in English law for holding that the ceremony is valid. [His Lordship read sections 1 (1) and 9 (1) (8) of the Act and also section 1 (1) of the Allied Forces Act, 1940, and continued:] The question is whether this saving of the old law of Poland renders valid by English law the ceremony between the parties. Without going into the matter in great detail, I am prepared to accept that marriages by an Army chaplain acting under the provisions of Polish law to which I have referred are matters of internal administration; but the difficulty is that the powers conferred by the Act of 1940 are powers to be exercised within the United Kingdom, and I cannot regard the performance of a ceremony of marriage in Italy as coming under this heading, even though, as Mr. Brown argued, the authority under which the chaplain acted was itself situate in the United Kingdom at the relevant time. In my judgment, the relevant authority in this matter is the chaplain who officiated at the ceremony in Italy, and nothing in the Polish Resettlement Act, 1947, enables the court to say that by English law this ceremony should be held to be valid.

There remains the argument put forward by the Queen's Proctor, and supported by counsel for the appellant husband, that the ceremony was valid at common law, and the requirements of the lex loci as to form did not apply. At the material date the Polish land forces in Italy were forces in belligerent occupation of Italian territory and therefore, it is said, exempt from the requirements of the lex loci. Karminski J. pointed out that the position of such persons has always been recognized by English law as requiring special consideration with regard to formalities. It is true that they may, in fact, submit to the lex loci, but there is no evidence that the parties did so. The ceremony was indeed performed in an Italian church, but by a Polish Army chaplain acting as a member of the Polish Forces, and no attempt was made to comply with the local law.

This matter was considered by Lord Stowell in *Ruding* v. *Smith* [4] after the Napoleonic wars. Before this case he had himself noticed the question in *Burn* v. *Farrar*,[5] reported immediately before *Ruding* v. *Smith*.[6] "This [7] was a case of nullity of marriage, instituted on the part of the wife, with reference to the "circumstances of the marriage, as celebrated in France, by the "chaplain of the British forces, under the Duke of Wellington, "and not in conformity to the law of France, as pleaded and set "forth. Upon admission of the libel in poenam, no appearance "having been given for the husband, Dr. Swabey described the "nature of the case, as above stated, observing that it would be, "when proved, a legal ground of nullity; as marriage, like all "other contracts, should be celebrated according to the lex loci."

---

[4] (1821) 2 Hag.Con. 371.

[5] (1819) 2 Hag.Con. 369.

[6] 2 Hag.Con. 371.

[7] 2 Hag.Con. 369.

C. A.
1957

TACZANOWSKA (*orse.* ROTH) *v.* TACZANOWSKI.

Hodson L.J.

Lord Stowell said[8]: "I shall admit this libel to proof, without "deciding at present on the effect which it may have if proved; "but merely to assist the party proceeding in procuring, if "possible, an answer to it from the opposite party. I have "received several letters addressed to me by English clergymen "and others in foreign countries, relative to marriages of this "kind, which letters I have felt it to be my duty not to answer; "as it certainly is no part of my public duty to answer private "inquiries upon questions which may come judicially before me. "Some of the marriages which gave occasion to those letters have "been contracted under circumstances similar to the present; and "it will be too much to expect that I should instantly give a "judgment upon such questions in an undefended suit, and in "which I can hear no argument in support of the validity of the "marriage. It appears that the husband here was an officer of "the army of occupation; and it may, therefore, very well be "doubted whether he was at all subject to the French law, as "pleaded in the libel. I shall give no decided opinion on that "point at present; but I shall admit the libel, in order that the "party may be the better enabled to obtain an appearance, and "bring the cause to a regular decision upon proper argument."

Lord Stowell in *Ruding* v. *Smith*[9] did not found his judgment on the proposition now contended for, although he said nothing to the contrary, and it is therefore necessary to consider the judgment in some detail. The suit was for nullity to set aside a marriage celebrated in a room in a private house between British subjects at the Cape of Good Hope on October 2, 1796, by the chaplain of the English forces, by virtue of a licence or permission from the general officer commanding the British forces in the colony. Drs. Jenner and Phillimore argued that the general principle of the lex loci could not apply to persons at the Cape as British subjects, under the protection of the British forces then in possession of the settlement by virtue of the recent surrender, even though in that case the terms of the capitulation might have preserved to the inhabitants the enjoyment of their former laws. Dr. Jenner did not feel himself called upon to maintain the proposition that all marriages abroad, according to the British law would be good, but submitted that there are no cases to the contrary, and rested his case on the impossibility of subjecting all individuals accompanying a conquering army to the laws of the conquered country.

---

[8] 2 Hag.Con. 369, 370.

[9] 2 Hag.Con. 371.

Lord Stowell held that the terms of the capitulation, preserving the prerogatives which the Dutch enjoyed, were not binding on the conquerors. He rejected the submission that the lex loci applied to the said parties. He said[10]: "Now if that be "true, that the law binds the British conqueror immediately upon "the capitulation (there being no express covenant to that effect) "it must be either from some known rule of the law of nations, "which subjects the conquerors to the laws of the conquered, or "from some peculiar principle of the law of England, which "imposes such an obligation upon the British conquerors of the "possessions of the enemy; for clearly the Dutch law, taken by "itself, cannot directly and by its own force, bind them. Dutch "authority could not impose it, for Dutch authority had ceased; "and a Dutch court, taking upon itself to force this law upon "British parties only and in transactions purely British, might "be thought to put forward no very just or moderate pretension; "unless some authority superior to it had imparted to it a force "which it did not itself directly possess. Such an authority, if it "exists at all, must be found either in the law of nations or in "the British law, for no other authority could give it. I am not "aware that any such principle or practice exists in the general "law of nations. It sometimes happens that the conquered are "left in possession of their own laws—more frequently the laws "of the conquerors are imposed upon them; and sometimes the "conquerors, if they settle in the country, are content to adopt "for their own use such part of the laws prevailing before the "conquest as they may find convenient under the change of "authority to retain. I presume that there is no legal difference "between a conquered country and a conquered colony in this "respect, as far as general law is concerned; and I am yet to seek "for any principle derivable from that law which bows the "conquerors of a country to the legal institutions of the con-"quered. Such a principle may be attended with most severe "inconvenience in its operation. The laws may be harsh and "oppressive in the extreme; may contain institutions abhorrent "to all the feelings, and opinions, and habits of the conquerors: "at any rate they can be but imperfectly understood; and that "they should all of them instantaneously attach and continue "obligatory upon them till their own Government had time to "learn them, and select and correct them, is a proposition which "I think a professor of general law would be inclined to consider "cautiously before it could be unreservedly admitted."

[10] 2 Hag.Con. 371, 380.

C. A.

1957

TACZANOWSKA (*orse.* ROTH) *v.* TACZANOWSKI.

Hodson L.J.

He added[11]: "It is true, indeed, that English decisions have "established this rule, that a foreign marriage, valid according to "the law of the place where celebrated, is good everywhere else; "but they have not è converso established that marriages of "British subjects, not good according to the general law of the "place where celebrated, are universally, and under all possible "circumstances, to be regarded as invalid in England. It is "therefore certainly to be advised that the safest course is always "to be married according to the law of the country, for then no "question can be stirred; but if this cannot be done on account "of legal or religious difficulties, the law of this country does not "say that its subjects shall not marry abroad. And even in cases "where no difficulties of that insuperable magnitude exist, yet, if "a contrary practice has been sanctioned by long acquiescence "and acceptance of the one country, that has silently permitted "such marriages, and of the other, that has silently accepted "them, the courts of this country, I presume, would not incline "to shake their validity, upon these large and general theories, "encountered, as they are, by numerous exceptions in the "practice of nations."

His conclusion was, however, of a guarded and limited nature, for he said at the conclusion of his judgment[12]: "In my opinion, "this marriage (for I desire to be understood as not extending this "decision beyond cases including nearly the same circumstances) "rests upon solid foundations. On the distinct British character "of the parties—on their independence of the Dutch law, in their "own British transactions—on the insuperable difficulties of "obtaining any marriage conformable to the Dutch law—on the "countenance given by British authority, and British ministration to this British transaction—upon the whole country being "under British dominion—and upon the other grounds to which "I have adverted; and I therefore dismiss this libel, as insufficient, if proved for the conclusion it prays."

This authority for an exception to the lex loci rule is recognized by the citation of the case by the Privy Council in *Berthiaume* v. *Dastous*.[13] The decision is, however, only to be taken as authority for the particular case, and, as Karminski J. noticed, the decision was based in part on the insuperable difficulties of obtaining any marriage according to Dutch law. Therefore, holding as he rightly did, that there were no such insuperable difficulties in this case in the celebration of a marriage by Italian law, he found himself unable to treat this case as one in which the exception to the rule applied. Indeed, it is right to say that, so far as the researches of counsel have gone, there is no authority which goes the whole length of the submissions of the Queen's Proctor in this case.

---

[11] 2 Hag.Con. 371, 390, 391.

[12] Ibid. 394.

[13] [1930] A.C. 79.

Lord Stowell laid emphasis on the British character of the parties, but there is, as Karminski J. also pointed out, nothing in the judgment in *Ruding* v. *Smith* [14] which would indicate that he would necessarily have refused to take the same view in the case of a foreigner. Lord Stowell's observations in the course of his judgment show that he relied to a great extent on the mere fact of the position of a conquering army in a conquered country—a situation which exists in this case, and I do not see in principle why, if this consideration is taken into account, it should not prevail even though the possibility of submitting to the laws of the conquered exists.

The principle in *Scrimshire's* case,[15] that parties by entering into a marriage contract in a foreign country subject themselves to have the validity of it determined by the laws of that country, does not apply in the case of a contract performed in an occupied country by a member of the occupying forces. Sir Edward Simpson said [16]: "There can be no doubt, then, but that both "the parties in this case, though they were English subjects, "obtained a forum, by virtue of the contract, in France. By "entering into the marriage contract there, they subjected them-"selves to have the validity of it determined by the laws of that "country." Later he said [17]: "As both the parties, by cele-"brating the marriage in France, have subjected themselves to "the law of that country relating to marriage; and as their mutual "intention must be presumed to be that it should be a marriage "or not, according to the laws of France, I apprehend it is not "in the power of one of the parties, by leaving the place, to draw "the question of the marriage or contract, 'ad aliud examen,' to "be tried by different laws than those of the place where the "parties contracted. They may change the forum, but they must "be tried by the laws of the country which they left. This "doctrine of trying contracts, especially those of marriage, "according to the laws of the country where they were made, is "conformable to what is laid down in our books, and what is "practised in all civilized countries, and what is agreeable to the

---

[14] 2 Hag.Con. 371.
[15] 2 Hag.Con. 395.
[16] Ibid. 408.
[17] Ibid. 412.

"law of nations, which is the law of every particular country, and "taken notice of as such."

This reasoning has no application when one is considering the position of a conquering army in a conquered country. This case is not complicated by any terms of capitulation and there was no evidence that in 1946 the Allied Forces in Italy were in any way subject to the laws of that country. I see no reason, therefore, why the validity of the ceremony in form should be governed by the lex loci in the case we are now considering. If it be said that since the parties are not British subjects, the common law of England does not apply to them, my answer is that such is the law prima facie to be administered in the courts of this country. There is no question here of personal incapacity to marry or any other consideration apart from form for which one would look to the law of the domicile, and there would be a grave difficulty in applying the law of the domicile or nationality, amounting to an impossibility in some cases, where a marriage had been celebrated between persons of different nations or different domiciles.

In dealing with form this obstacle to applying the law of the domicile was pointed out by Sir Edward Simpson in *Scrimshire* v. *Scrimshire*[18]: "If that principle is not to govern such cases, what "is to be the rule, where one party is domiciled, and the other "not? The jus gentium is the law of every country, and is "obligatory on the subjects of every country. Every country "takes notice of it; and this court observing that law, in deter"mining upon this case, cannot be said to determine English "rights by the laws of France, but by the law of England, of "which the jus gentium is part."

The common law conception of marriage knows no distinction of race or nationality. The effect of the decision in *Reg.* v. *Millis*[19] is that such a marriage to be valid must be celebrated before an episcopally ordained clergyman. A priest of the Church of Rome is in the same position as an Anglican clergyman: see *Reg.* v. *Inhabitants of Brampton.*[20]

The common law conception of marriage is thus stated in the speech of Lord Brougham in *Reg.* v. *Millis*[21]: "Now, by the "civil law, and by the earlier ecclesiastical law—indeed by that "law until the sixteenth century—marriage was a mere con"sensual contract, only differing from other contracts of this class "in being indissoluble even by the consent of the contracting

---

[18] 2 Hag.Con. 395, 417.

[19] (1844) 10 Cl. & Fin. 534.

[20] (1808) 10 East 282.

[21] (1844) 10 Cl. & Fin. 719.

C. A.
1957

TACZANOWSKA (*orse.* ROTH) *v.* TACZANOWSKI.

Hodson L.J.

"parties. It was always deemed to be a contract executed without any part performance; so that the maxim was undisputed, "and it was peremptory, 'Consensus, non concubitus, facit "'nuptias vel matrimonium.'"

The ceremony of marriage here fulfils all the essentials of a common law marriage, and in my opinion should be recognized as such notwithstanding the foreign nationality and domicile of the parties at the date of the ceremony.

The same conclusion was reached in *Savenis* v. *Savenis and Szmeck*,[22] a decision of Mayo J., where the facts have some similarity to those with which we are here concerned. The parties were Lithuanians who were married on November 1, 1945, in Bavaria in a Roman Catholic church according to the ritual of that church without complying with the German law as to form. Lithuania was then incorporated in the U.S.S.R. and warfare with Germany had ceased. Compliance with the local law was impossible, since no registrars were available. Mayo J., having regard to *Ruding* v. *Smith*[23] and other cases, said: "If the "matter be res integra, in circumstances where a marriage cannot "be lawfully solemnized in accordance with the laws of some "territory owing to chaotic conditions brought about (inter alia) "by warfare, and if the country in which the parties are, or were "formerly, domiciled is itself overrun, the government being "taken over by an alien power, then in such a case, so far as our "courts are concerned, I think it would be proper to extend (if it "be necessary) the area of legal recognition given to marriages "that conform to our own common law: compare Lord "Herschell's remarks in *Alexander* v. *Jenkins*.[24] Apart from "local measures, such as provision for the licensing of celebrants, "and for the recording of marriages, which do not go to the "fundamentals of the actual rite, the ceremony performed on "November 1, 1945, was such as would be given legal recognition in all civilized countries, or at least in many such. The "marriage was given ecclesiastical sanction. If in such circumstances a marriage is to be regarded as null and void, that will "have to be laid down elsewhere." Thus Mayo J., having rejected the lex loci for the reasons he gave, looked not to the law of the domicile (Lithuania) but to the common law.

In conclusion, I would only add that the court was referred to a number of cases of which *Maclean* v. *Cristall*[25] is an example,

---

[22] [1950] S.A.S.R. 309, 311.

[23] 2 Hag.Con. 371.

[24] [1892] 1 Q.B. 797, 801.

[25] (1849) 7 Notes of Cases Suppl. 24, 25.

C. A.
1957

TACZANOWSKA (*orse.* ROTH) *v.* TACZANOWSKI.

Hodson L.J.

and *Wolfenden* v. *Wolfenden*,[26] which was expressly approved by the Privy Council in *Penhas* v. *Tan Soo Eng*,[27] is another example, which are apparent but not real exceptions to the lex loci rule, since they are cases in which British subjects were held to have taken with them to a British colony so much of the common law as was applicable to their present situation, so that, in truth, the law applied was the law as found by the court in the particular cases to be the lex loci itself.

These cases cannot, in my opinion, be directly relevant to the problem under consideration, since there is here no question of the subjects of a paramount power taking with them their own laws into colonies where those subjects have settled. I would allow the appeal.

PARKER L.J. I agree, and would only add a few words on the point argued by Mr. Ormrod on behalf of the Queen's Proctor. It is, of course, a well-established principle of English law that the formal validity of a marriage depends on the lex loci celebrationis. I need only refer to what was said by Lord Dunedin in *Berthiaume* v. *Dastous*[28]: "If a marriage is good by the laws "of the country where it is effected, it is good all the world over, "no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would "not constitute marriage in the country of the domicile of one or "other of the spouses. If the so-called marriage is no marriage "in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the "place of the parties' domicile would be considered a good "marriage."

It is, however, clear that this is not an absolute rule. Thus a marriage celebrated in accordance with the Foreign Marriage Acts, 1892 to 1947, is valid notwithstanding that the form does not comply with the lex loci. Again, circumstances in the foreign country may be such that it is impossible for the marriage to be performed according to the lex loci. Thus, in *Savenis* v. *Savenis*,[29] the conditions in Germany, where the marriage was performed, were such that a valid marriage according to German law could not be performed. There were no registrars before whom alone a valid marriage was possible. Again, in *Ruding* v.

---

[26] [1946] P. 61; 62 T.L.R. 10; [1945] 2 All E.R. 539.

[27] [1953] A.C. 304.

[28] [1930] A.C. 79, 83.

[29] [1950] S.A.S.R. 309.

Smith,[30] one at any rate of the grounds of Lord Stowell's judgment was the insuperable difficulty of getting married at the time by Dutch law. It is sometimes said that another exception arises in the case of British colonists and settlers; see, for example, *Wolfenden* v. *Wolfenden*[31] and *Penhas* v. *Tan Soo Eng*.[32] Such cases are, however, only apparent exceptions, since I think that the ratio decidendi was that the English common law, or, rather, so much of it as is applicable in the circumstances, had become part of the lex loci.

In the present case, however, there was no obstacle to the performance of a valid ceremony of marriage in Italy according to Italian law, and that being so, the judge felt constrained to hold that there was nothing to displace the lex loci. Again, in *Pilinski* v. *Pilinska*,[33] Mr. Commissioner Latey, for the same reason, felt unable to depart from that law. In other words, they took the view that the only permissible departure from the lex loci arises in the case of impossibility. Whether this contention is valid depends, I think, on the proper view to be taken of the reasons for looking to the lex loci. It is fundamental to remember that what our courts administer is English law. Thus, in connexion with a marriage in Scotland, Sir William Scott said this: "Being "entertained in an English court, it must be adjudicated according to the principles of English law applicable to such a case. "But the only principle applicable to such a case by the law of "England is, that the validity of Miss Gordon's marriage rights "must be tried by reference to the law of the country, where, if "they exist at all they had their origin. Having furnished this "principle the law of England withdraws altogether and leaves "the legal question to the exclusive judgment of the law of "Scotland." See *Dalrymple* v. *Dalrymple*.[34]

The first case to establish the principle that the formal validity of a marriage depends on the lex loci was *Scrimshire* v. *Scrimshire*,[35] printed from a manuscript note of Sir Edward Simpson, communicated by Dr. Swabey. Of that decision Sir William Wynne said: "But I also remember to have heard that the "judgment was founded on great deliberation, and that Lord "Chancellor Hardwicke was consulted on it." See *Middleton* v. *Janverin*.[36] The law stated in *Scrimshire* v. *Scrimshire*[37] has

---

[30] 2 Hag.Con. 371.

[31] [1946] P. 61; 62 T.L.R. 10; [1945] 2 All E.R. 539.

[32] [1953] A.C. 304.

[33] [1955] 1 W.L.R. 329; [1955] 1 All E.R. 631.

[34] (1811) 2 Hag.Con. 54, 58–59.

[35] 2 Hag.Con. 395.

[36] 2 Hag.Con. 437, 446.

[37] 2 Hag.Con. 395, 408.

C. A.
1957

TACZANOWSKA (*orse.* ROTH) *v.* TACZANOWSKI.

Parker L.J.

stood ever since and the decision has received constant approval from the highest source. Sir Edward Simpson said[37]: "There "can be no doubt, then, but that both the parties in this cause, "though they were English subjects, obtained a forum, by virtue "of the contract, in France. By entering into the marriage "contract there, they subjected themselves to have the validity "of it determined by the laws of that country."

Later he said this[38]: "As both the parties, by celebrating "the marriage in France, have subjected themselves to the law "of that country relating to marriage; and as their mutual "intention must be presumed to be that it should be a marriage "or not, according to the laws of France, I apprehend it is not "in the power of one of the parties, by leaving the place, to "draw the question of the marriage or contract, ad aliud examen, "to be tried by different laws than those of the place where the "parties contracted. They may change the forum, but they "must be tried by the laws of the country which they left. This "doctrine of trying contracts, especially those of marriage, "according to the laws of the country where they were made, "is conformable to what is laid down in our books, and what is "practised in all civilized countries, and is agreeable to the law "of nations, which is the law of every particular country, and "taken notice of as such."

But if the rule is based on the fact that the parties must be taken to have subjected themselves to the law of the country where the marriage took place, what is the position of a party who is a member of a military force in belligerent occupation of that country? No doubt it is often physically possible for him to marry according to the laws of that country, but if he does not in fact subject himself to that law, what ground is there for presuming that he has done so? The law of nations certainly does not demand that result. I think that Lord Stowell must have had this point in mind when in *Burn* v. *Farrar*[39] he said this: "It appears that the husband here was an officer of the "army of occupation; and it may, therefore, very well be doubted "whether he was at all subject to the French law, as pleaded in "the libel. I shall give no decided opinion on that point at "present; but I shall admit the libel, in order that the party "may be the better enabled to obtain an appearance, and bring "the cause to a regular decision upon proper argument."

---

[37] 2 Hag.Con. 395, 408.
[38] Ibid. 412.
[39] 2 Hag.Con. 369, 370.

The matter, however, never came to trial. Two years later Lord Stowell gave the decision in *Ruding* v. *Smith*.[40] He might, it seems to me, have decided that case on this ground. He was, however, anxious not to go further than he needed, and his decision rests, as appears from page 394, on the particular facts of the case, namely, "On the distinct British character of the "parties—on their independence of the Dutch law, in their own "British transactions—on the insuperable difficulties of obtaining "any marriage conformable to the Dutch law—on the countenance given by British authority, and British ministration to "this British transaction—upon the whole country being under "British dominion—and upon the other grounds to which I have "adverted." At the same time he said nothing in conflict with this view. Indeed, in considering whether there is any principle which bows the conquerors of a country to the legal institutions of the conquered, he says[41]: "I am not aware that any such "principle or practice exists in the general law of nations."

In my judgment we should not, in such a case as this, look to the lex loci, nor do I see any reason why we should look to the law of the domicile of the spouses at the time of the marriage. Indeed, if English law were to look to the law of the domicile, what would be the position where the two spouses had different domiciles?

In my judgment there is no authority or reason which requires us to look to any other law, once the lex loci is inapplicable. I agree in this with Mayo J. in *Savenis* v. *Savenis*.[42] That being so, the only question is whether the marriage in this case is valid under the common law, and for the reasons given by my Lord I think it is. Accordingly, I would allow this appeal.

ORMEROD L.J. I agree, and would only wish to add a few words on the question of the validity of this marriage as a common law marriage. As the judge has found, the parties went through a ceremony of marriage in Rome not only with the desire of entering into a valid marriage, but in the belief that the ceremony was effective; and they lived together as man and wife for a period of four years after the marriage, during which time a child was born to them. He felt compelled, however, to declare the marriage null and void on the ground that on the authorities the law governing the case must be the lex loci celebrationis. As I understand his judgment, he based his

---

[40] 2 Hag.Con. 371.

[41] Ibid. 380, 381.

[42] [1950] S.A.S.R. 309.

C. A.
1957

Taczanowska (orse. Roth) v. Taczanowski.

Ormerod L.J.

decision on the view that the lex loci must prevail unless a marriage by that law was impossible or at least contrary to conscience, and referred to the words in the final paragraph of the judgment of Lord Stowell in *Ruding* v. *Smith*,[43] where undoubtedly one of the reasons for declaring the marriage to be valid was the insuperable difficulty of obtaining any marriage conformable to the Dutch law. But Lord Stowell clearly had in mind the fact that the husband had gone to the Cape under orders as a member of an occupying authority. He said[44]: "The husband goes there, not as a volunteer or a settler, by "intention of his own, or there to remain; but in the character "of a British soldier, in the prosecution of a further voyage "directed by British authority. He does not put himself under "the law of the place; he goes there neither to purchase, sue, "nor live." It was unnecessary for Lord Stowell, in the circumstances of *Ruding* v. *Smith*,[44] to decide that the lex loci should not apply on the ground that the parties should not be deemed to have submitted to the laws of the country in which the marriage took place. But that he had considered the question is clear from his short judgment in *Burn* v. *Farrar*,[45] a case which arose some two years earlier than *Ruding* v. *Smith*,[46] and he might well have decided the later case on that ground had the necessity arisen.

If the true reason for application of the lex loci is based on the principle that the parties shall be deemed to have submitted to it, then it seems difficult to apply that principle to a case such as the one at present under consideration, where the husband is in Italy not from choice but under the orders of his military superiors as a member of an occupying army. There can, I think, be no doubt on the judge's findings that this marriage was in a form recognized by the courts of this country as a common law marriage, and if the lex loci does not apply in this case—and in my view it does not—then for the reasons which have already been given in the judgments which have been read I agree that this marriage should be declared to be valid, and that the appeal should be allowed.

Appeal allowed.

Solicitors: *Lawrence & Co.; The Queen's Proctor.*

A. W. G.

---

[43] 2 Hag.Con. 371, 387.

[44] Ibid. 389.

[45] 2 Hag.Con. 369.

[46] 2 Hag.Con. 371.

N. *v.* N. AND L.

1957
Feb. 27, 28;
March 11.

Sachs J.

Husband and Wife — Divorce — Separation agreement — Rose v. *Rose clause—Covenant not to plead, allege or give evidence of pre-deed matrimonial offences — Husband's petition alleging post-deed adultery — Wife's and co-respondent's answers alleging pre-deed cruelty and adultery and post-deed adultery — Prayer for exercise of discretion in petition and wife's answer — Distinction between inter partes rights of spouses and right of court—Estoppel—Rights of co-respondent where no prayer for costs against him — Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 4 — *Matrimonial Causes Rules,* 1950 (*S.I.* 1950, *No.* 1940 (*L.*27)), *rr.* 16, 28.

In May, 1956, a husband and wife entered into a deed of separation which contained in clause 4 a *Rose* v. *Rose* clause of a full nature. In September, 1956, the husband commenced proceedings by a petition for divorce against the wife on the ground of post-deed adultery. He asked for the exercise of the court's discretion in his favour and for an order for costs against the co-respondent. In November, 1956, the wife filed an answer denying the adultery and seeking, by her cross-prayer, the dissolution of the marriage on the ground of alleged cruelty and adultery during the pre-deed period and further adultery subsequent to the date of the deed. She also asked for the exercise of the court's discretion. The co-respondent filed an answer in terms substantially identical with that of the wife and asked to be dismissed from the suit with costs.

In December, 1956, the husband obtained leave to amend his petition by striking out the prayer for costs against the co-respondent and the petition was amended accordingly. In February, 1957, the registrar, on the application of the husband, who relied upon the deed of May, 1956, made an order striking out from the wife's answer all the paragraphs containing pre-deed allegations as offending against the *Rose* v. *Rose* clause and from the co-respondent's answer all affirmative allegations both pre- and post-deed on the ground that, as the husband was asking for neither damages nor costs against the co-respondent, the latter was not entitled to plead anything beyond a denial of the adultery alleged. From that order the wife and the co-respondent appealed.

At the hearing of the appeal it was agreed by counsel that the matters in question were of a type which were best suited to a decision by way of a preliminary issue, and that the decision of the court should be given on the footing that all further pleadings setting up the deed of May, 1956, and the effects thereof had been delivered and no further evidence was desired to be admitted:—

Held, (1) that a *Rose* v. *Rose* clause amounted to a "final "condonation" or "absolute release" after which there could be no revival; the wife would not, therefore, be entitled to rely in seeking relief on the pre-deed allegations in her answer even in the event of proving post-deed misconduct. *Rowley* v. *Rowley* (1864)

3 Sw. & Tr. 338, affirmed (1866) L.R. 1 Sc. & Div. 63, and *Rose* v. *Rose* (1883) 8 P.D. 98 followed.

(2) That although facts relied on as discretionary bars were normally required to be pleaded, clause 4 of the deed, as a matter of construction, applied no less to recrimination than to prayers for relief, the wife was, therefore, not entitled to allege pre-deed offences in the form of discretionary bars to the husband's petition.

Plumer v. *Plumer and Bygrave* (1859) 4 Sw. & Tr. 257; Searle & Sm. 147 and *L.* v. *L.* [1931] P. 63; 47 T.L.R. 260 considered.

(3) That since a *Rose* v. *Rose* clause did not absolve a party seeking the exercise of the court's discretion from the duty of making full disclosure to the court of the whole history of the marriage, including pre-deed offences, it was necessary to distinguish between the right of the court in this respect and the inter partes rights of the spouses; the pre-deed allegations in the wife's answer might, therefore, be matters for the court to investigate to such extent as might be thought fit in the exercise of its duty under section 4 of the Matrimonial Causes Act, 1950.[1]

Russell v. *Russell* [1935] P. 39; 51 T.L.R. 173 and *L.* v. *L.* [1931] P. 63; 47 T.L.R. 260 considered.

(4) That the rules of the Divorce Division had always been regarded as giving co-respondents an unqualified right to plead against husband petitioners matters which, if the wife had pleaded them, might operate as absolute or discretionary bars, and thus the effect of rule 16 of the Matrimonial Causes Rules, 1950, entitling a co-respondent to file an answer to a petition, could not, on its

---

[1] Matrimonial Causes Act, 1950, s. 4: "(1) On a petition for divorce "it shall be the duty of the court to "inquire, so far as it reasonably can, "into the facts alleged and whether "there has been any connivance or "condonation on the part of the peti-"tioner and whether any collusion "exists between the parties, and also "to inquire into any countercharge "which is made against the peti-"tioner. (2) If the court is satisfied "on the evidence that—(*a*) the case "for the petition has been proved; "and (*b*) where the ground of the "petition is adultery, the petitioner "has not in any manner been acces-"sory to, or connived at, or condoned, "the adultery, or, where the ground "of the petition is cruelty, the peti-"tioner has not in any manner con-"doned the cruelty; and (*c*) the peti-"tion is not presented or prosecuted "in collusion with the respondent or "either of the respondents; the court "shall pronounce a decree of divorce, "but if the court is not satisfied with "respect to any of the aforesaid "matters, it shall dismiss the peti-"tion: Provided that the court shall "not be bound to pronounce a decree "of divorce and may dismiss the "petition if it finds that the petitioner "has during the marriage been guilty "of adultery or if, in the opinion of "the court, the petitioner has been "guilty—(i) of unreasonable delay in "presenting or prosecuting the peti-"tion; or (ii) of cruelty towards the "other party to the marriage; or (iii) "where the ground of the petition is "adultery or cruelty, of having with-"out reasonable excuse deserted, or "having without reasonable excuse "wilfully separated himself or herself "from, the other party before the "adultery or cruelty complained of; "or (iv) where the ground of the "petition is adultery or unsoundness "of mind or desertion, of such wilful "neglect or misconduct as has con-"duced to the adultery or unsound-"ness of mind or desertion."

true construction, vary according to whether or not the husband's prayer asked for costs against the co-respondent; accordingly, the co-respondent was entitled to seek the rejection of the petition on the ground of the husband's post-deed adultery, but as the right of the co-respondent was limited to alleging matters which, inter partes, might afford a defence to the petition, he was precluded from relying on the allegations as to the husband's pre-deed misconduct pleaded in his answer.

PRELIMINARY ISSUE.

The parties to the cause were married in June, 1953. On May 1, 1956, the husband and wife entered into a deed of separation, by the financial provisions of which the husband agreed first, to transfer to the wife absolutely the sum of £22,000, secondly, to transfer to trustees certain investments of which the income—estimated at £1,000 per annum—was to go to the wife for life or until the marriage was dissolved (whichever were the shorter period) and was then to revert to the husband, and, thirdly, to pay her during their joint lives, so long as the said marriage subsisted, an annuity of £2,000 less income tax. It contained a number of other common form clauses and also a *Rose* v. *Rose* clause, clause 4, of a full nature which read: "It "is hereby expressly agreed between the husband and the wife "that no proceedings shall be commenced or prosecuted by or on "behalf of either the husband or the wife against the other in "respect of any cause or complaint which now exists or has "arisen before the date of these presents and every offence (if "any) which has been committed by either party against the "other shall be considered as hereby forgiven and condoned and "in case hereafter either party shall commence or prosecute any "proceedings against the other in respect of any cause of com-"plaint which may hereafter arise no offence or misconduct "which has been committed before the execution of these presents "and no act deed neglect or default of either party in relation "to any such offence or misconduct shall be pleaded or alleged "by either party or be admissible in evidence."

On September 3, 1956, the husband commenced proceedings by a petition in which he sought a decree of divorce on the grounds of his wife's alleged adultery in May and June, 1956, namely, on account of post-deed adultery. On succeeding in these proceedings he would be entitled to recover the capital from which the £1,000 per annum was derived and would cease to have to pay the further £2,000 per annum. In his prayer he asked for the court to exercise its discretion in his favour and also that the co-respondent be condemned in costs. On November 8, 1956, the wife filed an answer of which paragraph 1 stated that she did not admit the adultery alleged, paragraphs 2 to 18 alleged cruelty against the husband from October, 1954, to February, 1956, paragraphs 19 and 20 adultery with a woman named in August, 1955, and paragraphs 21 and 22 adultery with another woman in July, 1956. Thus paragraphs 2 to 20 inclusive related to pre-deed matters, and paragraphs 21 and 22 to post-deed matters. By her cross-prayer the wife asked that the husband be not granted a decree on his petition, but that the discretion of the court be exercised in her favour so that the marriage might be dissolved by her being granted a decree.

On November 8, 1956, the co-respondent also filed an answer of which paragraph 1 stated he did not admit the adultery alleged, paragraphs 3 to 19 alleged the same pre-deed cruelty in terms identical with the allegations made by the wife in her answer, paragraphs 20 and 21 alleged the same pre-deed adultery as the wife had set out, and paragraphs 22 and 23 alleged the same post-deed adultery as paragraphs 21 and 22 of the wife's answer. In his prayer he asked that he might be dismissed from the suit with costs.

On November 22, 1956, the husband's solicitors notified the solicitors to the wife and the co-respondent that it was proposed to take such steps as were necessary to have removed from the record all allegations, whether made by the wife or the co-respondent, which came within the terms of clause 4 of the deed of separation. On December 14, 1956, the husband obtained leave to amend his petition by striking out so much of his prayer as asked for the co-respondent to be condemned in costs and on December 20, 1956, the petition was amended accordingly. On January 10, 1957, the husband took out a summons asking that paragraphs 2 to 20, i.e., all pre-deed allegations, be struck out of the wife's answer, and further that all the affirmative allegations in the co-respondent's answer, relating both to pre-deed and post-deed matters, be also struck out.

This summons did not specify on what grounds the striking out was sought: but by an affidavit dated January 11, 1957, the husband exhibited a copy of the deed of May 1, 1956, and relied thereon. No affidavit was filed in answer to that of the husband and upon the application coming before the registrar on February 5, 1957, an order was made striking out from the wife's answer paragraphs 2 to 20 inclusive (i.e., all pre-deed allegations) as offending against the *Rose* v. *Rose* clause; and from the co-respondent's answer paragraphs 3 to 23 inclusive (all affirmative allegations both pre-deed and post-deed) on the ground that, as the husband was seeking neither damages nor costs against the co-respondent, the latter was not entitled to plead anything in the present case beyond a denial of the adultery alleged against him. From that order the wife and co-respondent appealed.

At the hearing of the appeal it was agreed by counsel that the matters in question were of a type which were best suited to a decision by way of a preliminary issue. In those circumstances it was further agreed by counsel that the decision of the court should be given on the footing that, so far as concerned the points under discussion before the registrar and before the court on appeal, all further pleadings had been delivered and no further evidence was desired to be admitted. The substance of the pleadings was deemed to be as follows:— (i) As regards the wife's allegations—the husband to have delivered a reply alleging that the deed of separation dated May 1, 1956, had been entered into between husband and wife and that by reason of clause 4 thereof the wife was precluded from relying at trial on the matters alleged in paragraphs 2 to 20 of her answer. The wife then to have delivered a rejoinder to the effect that the deed was admitted, but that, as a matter of interpretation, the provisions of clause 4 did not apply to matters upon which the exercise of the discretion of the court was sought: that alternatively the deed had as regards the matters pleaded in paragraphs 2 to 20 no greater effect than condonation by conduct: and, in the further alternative, that the act of the husband in asking for the exercise of the court's discretion in this cause of itself debarred him, as regards the present cause, from relying on the said clause 4 to preclude the wife in the manner alleged in the reply. Any surrejoinder to be deemed merely to join issue. (ii) As regards the co-respondent's allegations—the husband to have delivered a reply to the effect, (*a*) that as no order for costs or damages was sought against the co-respondent he was not entitled to rely on any of the matters set out in paragraphs 2 to 23 of his answer, (*b*) further and in the alternative that the petitioner and the respondent had entered into the above deed, setting out the terms of clause 4: and that by reason thereof the co-respondent was precluded from relying on any matter in his answer which the wife was, by reason of clause 4, precluded from relying on in her answer. The co-respondent then to have

1957

N. *v.* N. AND L.

delivered a rejoinder as to (*a*) joining issue and as to (*b*) admitting the deed, denying that he was bound thereby, and relying in the alternative on parallel pleas to that of the wife in her rejoinder. The surrejoinder, if any, again to be deemed to be simply a joinder of issue.

On that basis the court was invited to come to a decision which was to have the same effect between the parties as if there had been tried as a preliminary issue whether or not the wife and the co-respondent were respectively precluded as alleged by the husband in his replies.

R. J. A. Temple Q.C. and *Colin Duncan* for the wife and the co-respondent. The co-respondent was not a party to the deed, did not have any knowledge of it at the date of the alleged adultery and is not bound by it. Any defence open to the wife and any allegation apt to defeat the petition is available to the co-respondent. This right does not depend upon the inclusion of a prayer for costs against him in the petition (see Rayden on Divorce, 6th ed., p. 301, para. 145). The registrar was wrong in law in holding that the co-respondent's right to cross-charge was conditional upon the inclusion of a prayer for costs. The relief to which a respondent to a divorce suit is entitled is relief from the court and not relief from the petitioner; this is clear from the wording of section 6 of the Matrimonial Causes Act, 1950. Matrimonial Causes Rules, 1950, r. 17 (2) and (3), show that a co-respondent may intervene not only by defending but also by bringing a claim to defeat a petition. [*Seddon* v. *Seddon and Doyle* [2] and *Plumer* v. *Plumer and Bygrave* [3] were referred to.]

The co-respondent is, moreover, a member of the public and as such can intervene if he can show a prima facie case as to the existence of a discretionary bar. He could do this even after decree nisi and the court would give him leave to intervene. Further, the Queen's Proctor can intervene as the mouthpiece of a party. It is therefore quite wrong that the co-respondent should be shut out in the way in which it is sought to exclude him in this suit.

As to the position of the respondent wife, clause 4 of the deed is improper in so far as it attempts to affect the rules of evidence. Moreover, the deed was not a final and effectual condonation; its effect was no more than that of condonation by conduct and the pre-deed offences have been revived by those occurring subsequent to the deed: *Norman* v. *Norman*.[4]

---

[2] (1860) 30 L.J.P.M. & A. 12.

[3] (1859) Searle & Sm. 147.

In *Russell* v. *Russell*[5] leave was given to amend the petition to add a prayer for discretion in spite of the existence of a deed containing a *Rose* v. *Rose*[6] clause. The court is thus under a duty to investigate matters of the sort pleaded by way of recrimination by the wife in the present case and this does not amount to a breach of the deed. [*Gooch* v. *Gooch*[7] was referred to.] *L.* v. *L.*[8] is to be distinguished from the present case in so far as in that case there was merely a prayer for relief and the exercise of the court's discretion was not sought. It is submitted that, if the wife be held not entitled to plead pre-deed offences in support of her prayer for relief, she is entitled, since the husband has asked for the exercise of the court's discretion, to plead them by way of recrimination.

Further, the petitioner husband's prayer for discretion amounts to this: that he is saying that he can commit a breach of the deed while the wife cannot: if he wishes to seek the exercise of the court's discretion he must make the whole history of the marriage available to the court and must, thereby, make pre-deed misconduct admissible.

Geoffrey Lawrence Q.C. and *Donaldson Loudoun* for the husband. The deed is of recent origin and one from which the wife takes substantial benefits. The co-respondent has repeated the wife's case word for word, which would enable him to call the wife as a witness. The fact that the husband has prayed for the exercise of the court's discretion does not affect the finality of a *Rose* v. *Rose* clause; that is clear when one looks at section 4 of the Matrimonial Causes Act, 1950, for there are matters which call for the exercise of the court's discretion whether there is a prayer for discretion or not. In *Rose* v. *Rose*[9] no discretion was prayed for, yet Dr. Tristram's argument was developed on the same lines as that of counsel for the wife in the present case. A *Rose* v. *Rose* clause absolutely bars the parties from the matters referred to therein for all purposes. In *Rowley* v. *Rowley*[10] all allegations of pre-deed misconduct in a wife's petition were struck out. Condonation has nothing in common with the effect of a *Rose* v. *Rose* clause.

[4] [1908] P. 6; 24 T.L.R. 37.

[5] [1935] P. 39; 51 T.L.R. 173.

[6] (1883) 8 P.D. 98.

[7] [1893] P. 99; 9 T.L.R. 303.

[8] [1931] P. 63; 47 T.L.R. 260.

[9] 8 P.D. 98.

[10] (1864) 3 Sw. & Tr. 338.

L. v. *L.*[11] is distinguishable from the present case. It refers only to the rights of parties and in any event in that case the husband did not file a discretion statement. In *L.* v. *L.*[11] Mr. Norman Birkett took the same point as Dr. Tristram in *Rose* v. *Rose.*[12] The argument of counsel for the wife would greatly extend the field of discretion. He contends that if the petitioner files a discretion statement the respondent is entitled to fill in the gaps of the discretion statement by pleading pre-deed matters. It does not appear that the husband in the present case has yet been in breach of clause 4 of the deed. The discretion statement has not been put in and it could be withheld until the court had decided the substantive issues of adultery. There has been no repudiation of clause 4.

The result of the authorities is that there is an apparent conflict between *L.* v. *L.*,[13] which decided that offences which have been the subject of a *Rose* v. *Rose* clause cannot be set up against a party even in the form of discretionary bars, and *Russell* v. *Russell,*[14] which held that where the discretion of the court has been sought it is the duty of the court to investigate the whole history of the marriage both pre- and post-deed. The reconciliation of this apparent conflict is that although the parties may contract themselves out of their full rights by virtue of a *Rose* v. *Rose* clause they cannot thereby affect the rights of the court under section 4 of the Matrimonial Causes Act, 1950.

As to the position of the co-respondent, since no relief against him is prayed he is not entitled to plead more than a denial of the adultery. Alternatively, if that be wrong, he is not entitled to plead matters which would not inter partes afford a defence to the allegations in the petition. He is, therefore, not entitled to plead allegations of pre-deed offences.

Cur. adv. vult.

March 11. SACHS J., reading his judgment, referred to the facts and the further pleadings deemed to have been filed and continued: The decision which I am about to give is, accordingly, by consent intended to take effect as if it were made upon a preliminary issue under rule 27 of the Matrimonial Causes Rules, 1950, and this will be recited in any order drawn up.

Before turning to the main points which were the subject of detailed arguments by counsel, I would first refer to certain matters as to which there is no controversy—either because they were stated to be common ground or because there exist authorities which, it was conceded, I am in practice bound to follow, whatever may be the position of higher courts.

---

[11] [1931] P. 63, 66.

[12] 8 P.D. 98.

[13] [1931] P. 63.

[14] [1935] P. 39.

First, that the wife's answer as pleaded relies on the alleged pre-deed matrimonial offences as constituting both grounds upon which she seeks a decree of divorce, and also discretionary bars which she is entitled as of right to plead by way of defence. Secondly, that *Russell* v. *Russell*,[1] a decision of Sir Boyd Merriman P., after hearing the argument of the King's Proctor, makes it clear that a *Rose* v. *Rose* clause does not absolve a party seeking the exercise of the court's discretion from fully disclosing to the court the whole story of the marriage, including pre-deed matrimonial offences. Next, that that if both husband and wife in the present cause establish the respective post-deed matrimonial offences alleged by them, then the dominant issue before the court might come to be: "On which "side should the discretion of the court be exercised?": and that, on this issue, the court may be faced with conflicting stories from the husband and wife respectively. Next, there is nothing before the court at present to show that the discretion statement filed on behalf of the husband refers to any pre-deed matrimonial offence of his—nor is it established that it necessarily either will or ought to refer to any. The same applies to the wife's discretion statement.

Next, that if and in so far as either the wife or the co-respondent is entitled to allege facts constituting a discretionary bar to the husband's prayer for relief, such facts must be pleaded (see the judgment of the full court in *Plumer* v. *Plumer and Bygrave* [2]).

Finally, that if, in relation to any matrimonial offence which the wife has to disclose to the court, she seeks to excuse herself by alleging a matrimonial offence on the part of the husband, be it cruelty or be it adultery, she must give notice of this under Matrimonial Causes Rules, 1950, r. 28 (4).

I now turn to the points argued by Mr. Temple in support of the wife's right to plead pre-deed offences of the husband. As regards her reliance on them as grounds for being granted a decree, his first contention was that the effect of clause 4 was no more than that of condonation by conduct—e.g., by sexual intercourse—and that, accordingly, the husband's post-deed matrimonial offences, if established, revived any pre-deed offences. As long ago, however, as *Rowley* v. *Rowley*,[3] it was stated in relation to full clauses of this type: " Now, condonation " is that species of forgiveness or reconciliation . . . which, in " the interest of justice, the law has also declared to be only " conditional on future good conduct. This has nothing in " common with a direct and positive bargain not to resort to the " powers of this court, made between the husband and wife, and " reduced into writing." That was also the view of Lord Chelmsford L.C. on the appeal to the House of Lords,[4] as appears from the following passage in his speech [5]: " The learned " Judge Ordinary very properly rejected the supposed analogy " between this case and a case of condonation. In the latter " case there is a conditional forgiveness; here there was an " absolute release." Later the Court of Appeal in *Rose* v. *Rose* [6] itself followed the same line. Jessel M.R. referred [7] to the effect of an appropriately drawn clause as " final condonation "—and Lindley L.J. referred [8] to it as " not a case of mere condonation: " it is a matter of express bargain."

---

[1] [1935] P. 39; 51 T.L.R. 173.

[2] (1859) Searle & Sm. 147.

[3] (1864) 3 Sw. & Tr. 338, 346.

It follows that as regards full clauses of the *Rose* v. *Rose* type—a phrase I use by way of precaution to distinguish them from the narrower types such as that considered in *Gooch* v. *Gooch* [9]—Mr. Temple's first contention cannot succeed: and, accordingly, the wife is not entitled to rely on anything in paragraphs 2 to 20 as affording her grounds for being granted a decree of divorce, even if she proves post-deed misconduct on the part of the husband.

The second contention put forward for the wife was that, even if she could not found a prayer for relief on pre-deed matrimonial offences, she had a right to set them up as discretionary bars to any relief claimed by the husband. When, however, one reads the concluding part of clause 4, as a matter of construction it applies no less to recrimination than to a prayer for relief: and if the bargain is valid as regards the latter, it is prima facie no less good as regards the former. More importantly *L.* v. *L.*,[10] a decision of Lord Merrivale P., decides this precise matter, adversely to Mr. Temple's contention.

The pleadings in *L.* v. *L.*,[10] which were called for by me during the argument, show that there the wife's petition dated August 13, 1930, alleged post-deed adultery and prayed a decree of divorce, whilst the husband's answer of November 6, 1930, denied the adultery alleged against him, counter-charged the wife with pre-deed adultery and in his turn prayed (contrary to the assumption made in *Russell* v. *Russell*[11]) for relief. Neither party in *L.* v. *L.*[12] asked for the exercise of the court's discretion. From the argument of Mr. Norman Birkett it is clear that the husband was there seeking to rely on the pre-deed adultery as a discretionary bar as well as a ground for relief, and also that the arguments today pressed by Mr. Temple were, subject only to one point to which I will return, put forward in 1931 with equal cogency. It is no less plain that they were rejected by Lord Merrivale. The husband was held[13] to have neither right nor duty to recriminate.

---

[4] (1866) L.R. 1 Sc. & Div. 63.
[5] Ibid. 68.
[6] (1883) 8 P.D. 98.
[7] Ibid. 99.
[8] 8 P.D. 98, 100.
[9] [1893] P. 99; 9 T.L.R. 303.
[10] [1931] P. 63; 47 T.L.R. 260.

The sole point of difference between *L.* v. *L.*[14] and the present cause is that in 1931 the petitioning spouse had not prayed for the exercise of the court's discretion, whilst in the present cause there is that prayer in the petition. By virtue of that fact Mr. Temple contended that *L.* v. *L.*[14] did not apply here. In my view, however, that fact makes no difference either on the true construction of clause 4 or on the position vis-à-vis the court's discretion under what is now section 4 (2) of the Matrimonial Causes Act, 1950. That a respondent spouse should be disentitled to recriminate when the petitioner is not candid enough to ask for discretion, but should be entitled to recriminate when the petitioner shows signs of being candid in that respect, would be odd.

On the " bargain " aspect of the matter it is of some importance, as regards both his first and his second contentions, to add that Mr. Temple specifically refrained from arguing that the husband had, by seeking the court's discretion, or in any other way, repudiated the deed of separation: he was careful to assert his submission that it still remained binding on both parties. Nor was any implied term of or condition or proviso to clause 4 either pleaded or formulated in argument which would or could, after skating neatly between *L.* v. *L.*[14] and *Russell* v. *Russell*,[15] arrive at the precise result now desired by the wife. Even if such a term were drafted I cannot see how it could pass the tests for certainty of mutual intention propounded, amongst others, by Scrutton L.J. in *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) *Ltd.*[16] so as to show that " . . . it is clear

---

[11] [1935] P. 39, 52, 53.
[12] [1931] P. 63.
[13] Ibid. 71.
[14] [1931] P. 63.
[15] [1935] P. 39.
[16] [1918] 1 K.B. 592.

"beyond a peradventure . . ." (I take the words from the judgment of Jenkins L.J. in *K. C. Sethia (1944) Ltd.* v. *Partabmull Rameshwar*[17]) that both parties were of the same mind on the subject. Indeed, had Scrutton L.J.'s question[18] been put at some round table conference at the time the deed was executed, the least likely of the various results would have been for either the spouses or their lawyers respectively or collectively to have answered unanimously "It is too clear." Thus, on the contractual side of the matter, the wife is unable to find any release from clause 4, either through accepted repudiation or through the terms of some implied condition or proviso, and the established construction of full *Rose* v. *Rose* clauses prevails.

The difficulty, however, which gave me considerable concern, and which provided Mr. Temple with his most forcible argument, was as to how, from a practical angle, a court can give effect both to *L.* v. *L.*,[19] under which the wife here has no right to recriminate, and to *Russell* v. *Russell*,[20] under which the court may, in the course of its duty, have to investigate the very matters which the wife has here pleaded by way of recrimination.

It was on this aspect of the case that Mr. Lawrence referred to "conflicting elements that have to be reconciled." To my mind, however, the solution he propounded was logical, and, though it may not appear familiar in its statement as applied to the present case, it is practicable and founded on authority. I accordingly accept his submission that, in cases such as the present where there is a *Rose* v. *Rose* clause in its full form, and where a party to it has, on later seeking a decree for a post-deed offence, a duty to disclose pre-deed offences to secure the exercise of the court's discretion, it is necessary to distinguish sharply between that part of the proceedings which concerns the inter partes rights of the spouse and that later part which concerns the court's right under section 4 of the Act of 1950 to be given full disclosure on pre-deed matters. That distinction seems to be explicitly recognized in *Russell* v. *Russell*,[21] where the contrast between the rights of the court and the inter partes position is more than once referred to, and it is clearly implicit in the judgment as a whole. The phrase in the headnote,[22] "Parties can contract themselves out of their rights, but it is "not competent for them to contract the court out of its "duty," to my mind, accurately summarizes the effect of Sir

---

[17] [1950] 1 All E.R. 51, 59; [1950] W.N. 5.

[18] [1918] 1 K.B. 592, 605.

[19] [1931] P. 63.

[20] [1935] P. 39.

[21] [1935] P. 39, 51 et seq.

[22] [1935] P. 39.

Boyd Merriman P.'s judgment as regards recriminatory material. Accordingly, I hold that the wife is precluded from relying, inter partes, on any of the matters pleaded in paragraphs 2 to 20 of her answer.

The machinery for the court in the present cause to investigate, should occasion arise, all pre-deed facts to such extent as may be thought fit is, be it noted, provided, inter alia, by Matrimonial Causes Rules, 1950, r. 28. This enjoins the party seeking discretion to make full disclosure of his or her own conduct and to give notice to the opposing spouse of any matrimonial offence alleged in excuse of that conduct. Further, in every cause the court can ask the Queen's Proctor to intervene at the trial itself. Alternatively, the court could, to save expense, presumably ask counsel opposing the exercise of discretion to cross-examine or to lead evidence on relevant matters: but that would be a matter for the court and not something which was the right of a party to the proceedings. Further, any lack of frankness at trial by the husband could bring in its train some later intervention of the Queen's Proctor. The court does not lack means for informing its conscience.

When using the phrase "to such extent as may be thought "fit," I expressly desired to leave open a further question which may arise when there is a contest as to discretion in a cause where the parties are bound by a full *Rose* v. *Rose* clause. Is the court in each and every such instance, in the exercise of its powers and rights, bound to or, alternatively, will it necessarily, if it has a discretion, choose to open up and investigate fully all those pre-deed disputed matters which, from the angle of public policy, it has held to have been inter partes beneficially buried in a "charter of oblivion"? It may be that this is a matter for the trial judge in his discretion to decide in each case on the particular facts before him: if so, that is a further reason why such an investigation cannot, at this stage, be taken for granted when considering the inter partes position.

Turning now to the pleading of the co-respondent, the first point for decision is the submission on behalf of the husband that as no order for costs was now sought against the co-respondent, the latter is not entitled to plead in his answer any matter which, if established, would operate as a discretionary bar to the wife's claim for relief—not even the post-deed adultery. Mr. Lawrence went so far as to urge, as, indeed, he was logically forced to do, that a co-respondent against whom costs are not sought may not plead conduct conducing, or, indeed, any matter except a denial of adultery. That argument flies in the face of the present wording of Matrimonial Causes Rules, 1950, r. 16, which gives a co-respondent a right to file an answer to the petition—and not merely an answer to the direct claim made against him: a right that will, as a matter of construction, appear even more plainly when there comes into force on April 30, 1957, that clarifying amendment[23] of this rule which had become necessary consequentially upon the 1954 amendment to rule 33. Indeed, the right of a co-respondent to attempt to get the petition dismissed by reason of any absolute or discretionary bar available to the wife, irrespective of the success or otherwise of any denial of the adultery charged against him, had already been recognized before reference to it was made in 1860 by the Judge Ordinary in *Seddon* v. *Seddon and Doyle*.[24] Further, the defences open to a respondent or co-respondent were treated as being identical in Browne's Principles and Practice of the Court for Divorce and Matrimonial Causes (1864 ed. at p. 30), and the Rules and Regulations for Divorce and Matrimonial Causes of 1865 provide for "each respondent" filing "an answer to the petition."[25]

Thus, since their inception, the rules of this Division have been continuously regarded as giving co-respondents an unqualified right to plead against husband petitioners matters which, if the wife had pleaded them, might operate as absolute or discretionary bars; and I am not prepared to accede to the submission that now, on its true construction, the effect of rule 16 varies according to whether or not the husband's prayer asks for costs against the co-respondent. It is incidentally to be noted that, if that submission were correct, collusion between husband and wife could expose co-respondents to an undeserved measure of obloquy, and also that a co-respondent's own claim to costs might be affected.

It follows that this co-respondent is entitled to plead the post-deed adultery of the husband and to seek to get the prayer in the petition rejected on that ground. The device of trying to preclude the co-respondent from so doing by deleting, after answer delivered, the prayer in the petition for costs fails.

The position as regards the co-respondent's right to plead and rely on pre-deed matrimonial offences in a case such as the present is, apparently, one which has not so far been the subject of any reported decision. Mr. Temple has pressed the points that the co-respondent is no party to the deed with its *Rose* v. *Rose* clause, is not suggested to have had any knowledge of it at the date of the alleged adultery, and cannot be bound by it. As a member of the public, it was further urged, the co-respondent could intervene, after decree nisi, to urge upon the court that the facts he has pleaded should be taken into account—so why not now?

---

[23] Matrimonial Causes (Amendment) Rules, 1957 (S.I. 1957, No. 176 (L.2)), r. 10.

[24] (1860) 30 L.J.P.M. & A. 12.

[25] Rule 28.

As against these points, Mr. Lawrence submits that the right of the co-respondent to file an answer to the petition is limited to alleging matters which, inter partes, may afford a defence to the petition: and that once it is clear that, inter partes, the allegations relied on in the co-respondent's pleading would, even if established, afford no such defence, the co-respondent cannot pursue them further. This, to my mind, is the right view of the matter. Any other view would almost inevitably result in an abuse of the process of the court: for wives could evade the effect of a *Rose* v. *Rose* clause wherever a friendly co-respondent was available to raise pre-deed charges against a husband.

To put it another way, if I am right in deciding that the wife is precluded from relying inter partes on the pre-deed matters under discussion, it seems a little difficult, on general principles, to see why a co-respondent should be permitted at trial to set up facts that can provide neither the wife with an inter partes answer to the husband's petition, nor himself with an answer to the charge of adultery: any contrary submission tends to equate unduly closely the co-respondent with the conscience of the court.

It is, of course, just conceivable that one day a co-respondent might so frame his pleading as to allege that, in an exceptional set of circumstances, a *Rose* v. *Rose* clause had been agreed with a view to operating some sort of fraud on him—but that is not the position here, and if it arose and were pleaded different considerations would apply. Save for some such case, it is a little difficult to see what legitimate complaint can be made by a wrong-doer in the shape of an adulterous co-respondent if he finds that the woman with whom he has committed adultery has previously entered into an honest agreement with her husband containing a clause held by the courts to be beneficial from the angle of public policy. I may perhaps add that co-respondents prepared to swear that they would not have committed adultery had they known the wife had previously signed a deed with a *Rose* v. *Rose* clause must be extremely few in number—and those who would be believed even rarer.

In the present case the co-respondent is accordingly precluded from relying on paragraphs 3 to 21 inclusive of his answer because the facts therein alleged cannot, even if established, provide a defence inter partes to the petition.

If a stage in the proceedings is reached where the court desires, in the performance of that duty to which *Russell* v. *Russell*[26] refers, to investigate pre-deed matters affecting the exercise of its discretion and wishes in that behalf to consider anything the co-respondent can say as to those questions, nothing in any order I am making hinders the court from taking whatever steps it may deem appropriate. The present order only precludes the co-respondent from raising those matters inter partes.

The preliminary issue is thus determined as follows: The wife is precluded from relying at trial inter partes on the allegations set out in paragraphs 2 to 20 inclusive of her answer; and the co-respondent is similarly precluded from relying upon the allegations set out in paragraphs 3 to 21 inclusive of his answer.

I do not consider it necessary to add to that determination any words to the effect—" without prejudice to any duty of the " wife or co-respondent respectively to give evidence on the " matters alleged if and in so far as they or either of them " may be called upon so to do by virtue of the Matrimonial " Causes Rules, 1950, or by any other power of the court "—because that point is implicit in the words " inter partes " in the order.

One further point remains. It may be that the wife may yet give notice under rule 28 (4) of her reliance on the matters now alleged in paragraphs 2 to 20 of her answer, or some of them, in an endeavour to exculpate herself on some matter relied on in her discretion statement. In that event, I understand that Mr. Lawrence would desire an opportunity to consider whether to apply to the court before trial for some direction which could enable him to avoid the expense of bringing witnesses to the court on these matters until it is clear that they would necessarily arise. To ensure that he has a right to make such application as he may think fit on such a matter, I give him liberty to apply thereon, without, of course, indicating whether any such application could be or would be successful.

Order accordingly.

Solicitors: *Theodore Goddard & Co.; Withers & Co.*

E. J.

---

[26] [1935] P. 39.

HAMMOND *v.* HAMMOND.

1957
July 12.

Karminski J.

Legal Aid—Costs—Taxation—Barrister—Fees of—Summons for review of taxation—Summons in name of assisted party—Jurisdiction to consider summons.

The court has no jurisdiction to hear an application for a review of taxation of costs in a legal aid case brought in the name of an assisted party, in fact for the benefit of his legal advisers, but in which the party himself has no interest.

Rolph v. *Marston Valley Brick Co. Ltd.* [1956] 2 Q.B. 18; [1956] 2 All E.R. 50 considered.

APPLICATION for review of taxation.

On June 11, 1956, the petitioner, the applicant in the summons, was granted a decree nisi of dissolution of marriage on the grounds of cruelty, together with an order for party and party costs against the respondent and a further order for the taxation of the costs as between solicitor and client under the Third Schedule to the Legal Aid and Advice Act, 1949. The respondent was not at the date of the summons, and never had been, an assisted person under that Act. The petitioner's costs were duly taxed by Mr. Registrar Townley Millers. Reasons for objections to the taxation were lodged thereafter, and were answered by the registrar. The application asked that the matter might be referred back to the registrar with a direction to vary his certificate and that the respondent might be ordered to pay the costs of this application.

The matters objected to in the taxation related wholly to the fees allowed to counsel then appearing for the petitioner, who was other than counsel appearing for the petitioner on the application. The suit was a contested one and lasted for five and a half days. Junior counsel only appeared on each side, and no application was made to the area committee on behalf of the petitioner for leave to brief leading counsel. The fee claimed for the petitioner's counsel was £53 15s. on the brief, £32 10s. refresher fee in respect of the second, third, fourth and fifth days of the hearing, and £11 in respect of the short sixth day. On the party and party taxation, the registrar allowed £32 10s., £21 15s. and nil respectively. But in the solicitor and client taxation he allowed £5 5s. extra on the brief fee and £11 in respect of the sixth day.

The application was heard in chambers on March 29, 1957, before Karminski J., who adjourned it to enable the Law Society to intervene if so desired and for argument in open court.

Joseph Jackson and *J. C. J. Tatham* for the applicant. On numerous occasions in recent years the court has considered applications with regard to an alleged error in the taxation of costs arising in cases which had been brought under the facilities provided by the Legal Aid and Advice Act, 1949: see *Gibbs* v. *Gibbs* [1]; *Self* v. *Self* [2]; *Young* v. *Young and Kohler* [3]; *Isaac* v. *Isaac*,[4] and *Eaves* v. *Eaves and Powell*.[5] In none of these cases was the proposition advanced that the court had no jurisdiction to hear the matter, and it was not until *Rolph* v. *Marston Valley Brick Co. Ltd.*[6] that the matter was ever doubted. It had been raised and, it is submitted, settled by the Court of Appeal in *Page* v. *Page*,[7] following *Brown* v. *Brown*.[8]

In *Rolph* v. *Marston Valley Brick Co. Ltd.*[9] Devlin J. held, on refusing an application for a review of taxation in a legal aid case, that he had no power to order that the costs of the summons should be taxed under the Act of 1949. See, however, *Page* v. *Page*.[10] Although the decision of Devlin J. was based on other grounds, he expressed doubts as to whether he should not have refused to hear the summons from the outset, since the assisted person had no interest in, and was, therefore, not a party to, the proceedings, and the solicitor who issued the summons must have, therefore, done so without authority. If this view, obiter, of Devlin J. be correct, it must be conceded that it constitutes a bar to this application, which is, in fact, brought on behalf of the party's legal advisers. But the singular result would then follow that the registrar is made the final assessor in all legally aided cases.

The statement of Devlin J. was not part of his decision; it is at the highest only to be regarded by this court as of persuasive authority and, even as such, it is submitted that there are cogent reasons why it should not be followed. In *Rolph* v. *Marston Valley Brick Co. Ltd.*[11] the court was concerned with a claim for damages in a running down action which had been compromised by the payment of a sum of damages to the infant plaintiff. On that payment the legal aid fund had a first charge. The present matter is a divorce suit in which no damages are claimed and in which the petitioner, having discharged her contribution, cannot be affected by any increase in counsel's fees. The same principles do not apply to taxation of costs in a matrimonial suit and at common law: see *Allen* v. *Allen and D'Arcy*[12] and *Gibbs* v. *Gibbs.*[13] In any event, the obiter dictum of Devlin J. in *Rolph* v. *Marston Valley Brick Co. Ltd.*[14] is not consistent with the judgment of Evershed M.R. in *Page* v. *Page*,[15] in which the Court of Appeal dealt with the issue of jurisdiction, the question of contrary interest and the question of the payment for the prosecution of these appeals out of public funds.

---

[1] [1952] P. 332; [1952] 1 T.L.R. 1143; [1952] 1 All E.R. 942.

[2] [1954] P. 480; [1954] 2 All E.R. 550.

[3] [1955] 1 W.L.R. 395; [1955] 1 All E.R. 796.

[4] [1955] P. 333; [1955] 2 All E.R. 811.

[5] [1956] P. 154; [1955] 3 All E.R. 849.

[6] [1956] 2 Q.B. 18; [1956] 2 All E.R. 50.

[7] [1953] Ch. 320, 328–329; [1953] 1 All E.R. 626.

[8] [1952] 1 T.L.R. 930; [1952] 1 All E.R. 1018.

[9] [1956] 2 Q.B. 18.

[10] [1953] Ch. 320, 329.

[11] [1956] 2 Q.B. 18.

It was, moreover, suggested in *Rolph* v. *Marston Valley Brick Co. Ltd.*[16] that, in applications such as the present, counsel had no right to be heard. It is submitted that this is not so and that counsel has a right, on his own behalf, to be heard as to his fees, at least in cases where no financial detriment can result to the lay client. It is wrong to assume that the lay client is the only person who has any status under the Legal Aid and Advice Act, 1949. By section 6 (1) of the Act counsel is entitled to have his name on legal aid panels, and by section 6 (5) the fees to counsel "shall be paid out of" (the legal aid) "fund." The section is mandatory and it is to be noted that in the matter of payment neither the solicitor nor the lay client have any concern. The proper basis of taxation is set out in regulation 18 (2) of the Legal Aid (General) Regulations, 1950, which says that such payments to solicitor and counsel may be authorized as amount to "fair remuneration for work actually and reasonably done on "behalf of the assisted person." When considering whether a right to intervene by counsel on his own behalf can be construed from the Act it is not insignificant to consider that by the Third Schedule counsel sacrifices 15 per cent. of the taxed costs and also, according to the same Schedule, para. 3, that "counsel's "fees shall be taxed as if they had been paid by the solicitor. ". . ." It is submitted that that is the proper approach on taxation, since legal aid is a departure from the normal rule that counsel's fees must be paid before taxation.

To sum up: on the question of the jurisdiction of the court to hear this matter, this court is not bound by the statement of the law by Devlin J. in *Rolph* v. *Marston Valley Brick Co. Ltd.*,[17] which was obiter and inconsistent with the decision of the Court of Appeal in *Page* v. *Page*.[18] So far as the remarks of Devlin J. are of persuasive authority, their correctness is disputed. It is submitted that in a legal aid case where the lay client has contributed to the fund, any taxation by his solicitor is against the lay client's interest, since the lay client's "estate" would suffer. It is, however, not necessary to go as far as this in the present case, since it is, in the alternative, submitted that on the true construction of the Act of 1949 counsel is entitled, in his own right, to make an application such as the present where the lay client is entirely disinterested in the proceedings.

---

[12] (1860) 2 Sw. & Tr. 107.

[13] [1952] P. 332, 342–343.

[14] [1956] 2 Q.B. 18.

[15] [1953] Ch. 320, 328–329.

[16] [1956] 2 Q.B. 18, 26–27.

[17] [1956] 2 Q.B. 18.

The registrar erred in principle in respect of the taxation: *Theocharides* v. *Joannou*[19]; *Reed* v. *Gray*[20]; *Francis* v. *Francis and Dickerson*,[21] and *In re Jerome*.[22] The distinction between fees allowed only under the solicitor and client column and fees allowed under the party and party column must be logical, and in the present case it is not so: *Lyon* v. *Lyon*.[23]

It is desired to leave open the question whether the present proceedings are an interlocutory appeal within the meaning of the Legal Aid (General) Regulations, 1950; counsel are not seeking payment in respect of the present application.

David Walsh for the respondent. There is no express provision in the Act of 1949 or in the regulations made thereunder for the making of an application for the review of a legal aid taxation: see *Rolph* v. *Marston Valley Brick Co. Ltd.*[24] The legal aid scheme is entirely a statutory creature and it is, therefore, incumbent upon the applicant to show that by necessary implication Parliament must be deemed to have intended the court's power to review taxation to be used in connexion with cases brought under the scheme.

It is quite wrong to maintain that the solicitor of the petitioner in the divorce proceedings is acting on her authority in the present application. This cannot be so, since the outcome of the proceedings cannot affect her. The situation of the Crown in *Adams* v. *Naylor*[25] is analogous and the concluding passage of the judgment of Viscount Simon is in point. In such circumstances the court can have no jurisdiction and it is submitted that the reasoning of Devlin J. in *Rolph* v. *Marston Valley Brick Co. Ltd.*,[26] although obiter, was right and should be followed.

---

[18] [1953] Ch. 320.

[19] [1955] 1 W.L.R. 296; [1955] 1 All E.R. 615.

[20] [1952] Ch. 337; [1952] 1 T.L.R. 114; [1952] 1 All E.R. 241.

[21] [1956] P. 87; [1955] 3 All E.R. 836.

[22] [1907] 2 Ch. 145.

[23] [1953] P. 1; [1952] 2 T.L.R. 775; [1952] 2 All E.R. 831.

[24] [1956] 2 Q.B. 18.

[25] [1946] A.C. 543.

Brown v. *Brown*[27] and *Page* v. *Page*,[28] both decided in the Court of Appeal, are not relevant to the point at issue in the present case. All that those cases decided was that where a judge is dealing with proceedings to which an assisted person is a party, the provisions of regulation 18 (3) of the Legal Aid (General) Regulations, 1950, are mandatory. There is nothing in those cases which entitles the court to jurisdiction which does not otherwise exist. [*In re Jerome*[29]; *Self* v. *Self*[30]; *Isaac* v. *Isaac*[31]; *Theocharides* v. *Joannou*,[32] and *Mines* v. *Mines*[33] were also referred to.]

Joseph Jackson and *J. C. J. Tatham* replied.

KARMINSKI J. referred to the facts and continued: When the application came before me in chambers, it appeared that it might raise matters of some general interest under the Legal Aid and Advice Act, 1949, and I, therefore, adjourned it into open court for argument. The matter has been very fully and carefully argued by all three of the counsel engaged in this application, and I am much indebted to them for their help.

Two points arise here for consideration: first, can the court entertain an application of this kind when it is brought in the name of an assisted party who has no interest in it, but is in fact brought solely for the benefit of the party's legal advisers? If that question can be answered affirmatively and the court can entertain the present application, I shall have to consider whether there are grounds on which the court should vary the order of the registrar.

It is conceded here that the petitioner can neither suffer nor benefit from any variation of the order made on taxation. The small contribution which she was ordered to make by the legal aid committee has been paid and cannot now be increased. If the present application succeeds and the fees to counsel payable under the party and party taxation are increased, they will fall on the respondent who is not an assisted person. If the fees are increased on the solicitor and client taxation, the increase will fall on the legal aid fund which was not represented before me. But the petitioner, the nominal applicant in the present summons, has no interest in (and perhaps no knowledge of) these proceedings; certainly she can be in no way adversely affected by any variation in the costs allowed on taxation.

---

[26] [1956] 2 Q.B. 18.

[27] [1952] 1 T.L.R. 930; [1952] 1 All E.R. 1018.

[28] [1953] Ch. 320.

[29] [1907] 2 Ch. 145.

[30] [1954] P. 480.

[31] [1955] P. 333.

[32] [1955] 1 W.L.R. 296.

[33] [1957] 1 W.L.R. 628.

There have been a number of cases in this Division which have been decided since the Legal Aid and Advice Act, 1949, in which the remuneration of solicitors and counsel has been investigated. In *Gibbs* v. *Gibbs* [1] Havers J. had to consider, on a review of taxation, the general principle distinguishing party and party and solicitor and client taxations. The power of the court to entertain an application of this kind in a legal aid case was neither doubted nor argued. In *Self* v. *Self* [2] Sachs J. had to consider the question of counsel's fees in an undefended case tried out of London, but again the power of the court to hear the application was not considered. Questions relating to counsel's fees were decided in *Young* v. *Young and Kohler*,[3] *Isaac* v. *Isaac* [4] and *Eaves* v. *Eaves and Powell*.[5] In none of these cases was the power of the court to hear the applications discussed.

It was not, I think, doubted in this Division that the court had power to hear an application to review a taxation in a legal aid case. But the decision of Devlin J. in *Rolph* v. *Marston Valley Brick Co. Ltd.*[6] has raised the question of the court's powers. In that case the infant plaintiff's claim for personal injuries was compromised by the defendants submitting to judgment for £1,500, with costs. The infant plaintiff, suing by her father and next friend, was legally aided and her contribution was assessed at £22 10s. On taxation the taxing master disallowed counsels' fees in respect of a view, allowing instead a lesser fee for a consultation. An application was made for a review of taxation, but this was refused by Devlin J. on the ground that the taxing master had made no error of principle.

Application was then made for an order to tax the costs of the summons under regulation 18 (3) (*b*) of the Legal Aid (General) Regulations, 1950, but Devlin J. held [7] that he had no power to order such a taxation, on the grounds that the summons was interlocutory and not a final order and also because the proceedings were not proceedings to which the assisted person was a party. No application is made in the present case to tax the costs of the summons before me, nor has the petitioner sought or obtained leave from the legal aid committee to bring this summons. The point therefore decided by Devlin J. is not before me and does not here arise.

---

[1] [1952] P. 332; [1952] 1 T.L.R. 1143; [1952] 1 All E.R. 942.

[2] [1954] P. 480; [1954] 2 All E.R. 550.

[3] [1955] 1 W.L.R. 395; [1955] 1 All E.R. 796.

[4] [1955] P. 333; [1955] 2 All E.R. 811.

[5] [1956] P. 154; [1955] 3 All E.R. 849.

[6] [1956] 2 Q.B. 18; [1956] 2 All E.R. 50.

[7] [1956] 2 Q.B. 18, 29.

Without expressly deciding the point, Devlin J. thought[8] that he ought to have dismissed the summons at the outset on the ground that the solicitor could not have had authority from the assisted person to bring the summons, and he pointed out that the solicitor would be seeking to obtain money from her estate partly for his own benefit. Devlin J. added this observation[9]: " When the court becomes aware that a solicitor is acting " without authority, I think that the court should act of its own " motion and refuse to grant relief: see *Daimler Co. Ltd.* v. " *Continental Tyre & Rubber Co.* (*Great Britain*) *Ltd.*, *per* Lord " Parker of Waddington.[10] "

Relying on the observations of Devlin J., Mr. Walsh argued that there was no power in the court to review taxation in a legal aid case. Mr. Jackson pointed out that the observations of Devlin J. referred to above were not part of his decision. Mr. Jackson also distinguished the present application on the facts from *Rolph* v. *Marston Valley Brick Co. Ltd.*,[11] since there a variation of taxation would have affected adversely the financial interests of the plaintiff, whereas in the present application the financial interests of the petitioner would remain unaffected by any review of taxation.

I agree that I am not bound by the observations of Devlin J. on the power of the court to entertain an application of the present kind, since they were not directly concerned with the issue which he had to decide. But I have read with care and interest his observations on the power of the court to hear an application of the present kind, and I have come to the conclusion that his reasoning is unanswerable and that I ought to follow it. I do not think that the fact that, in the present case, the petitioner's financial interests are unaffected affects the principle. I have, therefore, come to the conclusion that the court has no power to deal with the present application and it must, therefore, be dismissed.

I would add that I do not regard this result as wholly satisfactory, since there may be cases in which it is desirable for

---

[8] [1956] 2 Q.B. 18, 27.

[9] Ibid.

[10] [1916] 2 A.C. 307; 32 T.L.R. 624.

[11] [1956] 2 Q.B. 18.

1957

HAMMOND
v.
HAMMOND.

Karminski J.

a review of taxation to be held in legal aid cases. As I understand the present legal aid regulations, they do not provide the machinery for a review except on the application of the parties themselves: see the observations of Harman J. in *Theocharides* v. *Joannou.*[12] This appears to preclude both the legal aid fund and the solicitors or counsel to the parties from questioning a taxation, but it may be in the interests of the working of the Legal Aid and Advice Act, 1949, that both the fund and the legal advisers to the parties should be entitled to be heard. I agree with Devlin J. that at present the legal aid scheme treats the taxation as if it were a piece of machinery into which the bill is inserted and from which it emerges correct. But this assumes a degree of infallibility on the part of those charged with the difficult task of taxing costs in legal aid cases which few taxing officers would, perhaps, care to accept.

I think it desirable to add the following comments on the actual taxation in this case. So far as the taxation of costs is concerned, I cannot see that the taxation by the registrar can be criticized on any matter of principle. The registrar clearly took into account the nature and length of the case, and the fact that counsel who appeared for the petitioner has had very great experience in this class of litigation. I cannot accept that the area committee would have allowed leading counsel to be briefed, since no such application was made to the area committee. The issues at the trial were issues of fact only, and of a kind which counsel for the petitioner was most certainly well able to deal with. I am not prepared to assume even the probability of the area committee (if asked) allowing leading counsel to be briefed. Nor do I think that the fact that counsel for the petitioner asks for (and no doubt often gets) a larger fee in unassisted cases than that allowed here, binds the taxing registrar to any particular figure. I am satisfied here that the registrar took the relevant factors into account and did not err in principle in any way.

Summons dismissed.

Solicitors: *W. Timothy Donovan; Coleman & Co.*

E. J.

---

[12] [1955] 1 W.L.R. 296; [1955] 1 All E.R. 615.

DAVIES *v.* DAVIES.

1957
May 2, 3.

Lord Merriman P., Wallington J.

Husband and Wife—Justices—Refusal to adjudicate—Appeal—Jurisdiction of High Court—Wife's complaint of persistent cruelty, desertion for less than three years and wilful neglect to maintain—Refusal to adjudicate on ground that all matters more conveniently dealt with in High Court—Power of justices to divide matters and refer in part to High Court—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 10 *and* 11.

Justices refused, in the purported exercise of their power under section 10 of the Summary Jurisdiction (Married Women) Act, 1895,[1] to adjudicate on a wife's complaint of constructive desertion from March 27, 1956, persistent cruelty and wilful neglect to provide reasonable maintenance, on the ground that the matters would be more conveniently dealt with in the High Court. They considered the High Court the appropriate forum, as they themselves had no jurisdiction to prohibit the wife, a former German who desired to return to that country with the child of the marriage whose custody she sought, from taking the child out of the jurisdiction. On appeal from that refusal:—

Held, (1) that, since there was no provision whereby the issue of desertion of less than three years' duration could be brought before the High Court for any form of substantive relief, the condition precedent to the exercise by the justices of their power under section 10 of the Act of 1895, namely, that the matter should be capable of investigation and determination by both courts, had not been fulfilled and the Divisional Court had, therefore, in the circumstances, jurisdiction to hear the appeal.

Perks v. *Perks* [1946] P. 1; [1945] 2 All E.R. 580 and *Smyth* v. *Smyth* [1956] P. 427; [1956] 2 All E.R. 476 applied.

(2) That, although the words of the section "or any of them" referred, on their true interpretation, to the "matters in question" (and not to the parties to the dispute) thus entitling the justices to retain the matter of desertion and refer the other matters to the High Court, those matters in the circumstances consisted of a multiplicity of issues in substance and in fact integrally bound up

---

[1] Summary Jurisdiction (Married Women) Act, 1895, s. 10: "If in "the opinion of a court of summary "jurisdiction the matters in question "between the parties or any of them "would be more conveniently dealt "with by the High Court, the court "of summary jurisdiction may refuse "to make an order under this Act, "and in such case no appeal shall "lie from the decision of the court "of summary jurisdiction: Provided "always, that the High Court or a "judge thereof shall have power by "order in any proceeding in the "High Court relating to or compris"ing the same subject matter as the "application so refused as aforesaid, "or any part thereof, to direct the "court of summary jurisdiction to "rehear and determine the same."

S. 11: "Save as herein-before pro"vided, an appeal shall lie from any "order or the refusal of any order "by a court of summary jurisdiction "under this Act to the Probate, "Divorce and Admiralty Division of "the High Court of Justice."

together, and it would, therefore, have been plainly wrong for them to do so and all the matters should be sent back for determination in the justices' court.

Per curiam. (1) It is not open to justices to assume jurisdiction to decide the principal matter and then, under section 10 of the Act of 1895, refer the question of the nature and details of the relief to be granted in the consequential order for decision by the High Court.

(2) In cases where an order for custody is sought under the Act of 1895 it is proper for the justices to refuse to make an order and leave the parties to deal with that matter under the provisions of some other Act or jurisdiction.

APPEAL from Carmarthen justices sitting at Llanelly.

The parties were married in April, 1953; the wife was then the widow of a German soldier killed in the war, the husband was of British nationality.

On July 31, 1956, the justices of the Petty Sessional Division of Llanelly, Carmarthen, heard the complaint of the wife by which she alleged that the husband had deserted her on March 27, 1956, had treated her with persistent cruelty within the six months before that date and was guilty of wilful neglect to provide reasonable maintenance for herself and the child of the marriage after that date and before the date of the complaint, May 16, 1956. She asked for relief in the form of a non-cohabitation order, custody of the child and maintenance for herself and the child.

The justices heard the evidence of the parties and their witnesses in the course of which the wife stated that she wished to return to live in Germany and take the child with her. They then refused to make an order, purporting to act in exercise of their power under section 10 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground that the case would be more conveniently dealt with by the High Court. The justices gave the reasons for their refusal. Paragraphs 1 and 2 were purely formal. The remainder read as follows: ". . . 3. One "of the orders the wife sought was an order for the custody of "the child of the marriage. 4. The question of the custody "of the child is an important issue to the parties in this case "as the applicant desires to live in Germany and to take the "child of the marriage with her. 5. We, the magistrates' "court, cannot make provision for the child not to be removed "to Germany without the leave of the court. The orders we "can make are limited to giving the legal custody of the child "to the applicant and making an order for access by the respondent. 6. We are of the opinion, having regard to the applicant's intention and the circumstances of the case, that our powers are inadequate to make such provision as would be for the welfare of the child and would be just between the parties, and for this reason we refuse to make an order as we are of the opinion that the matter of custody would be more conveniently dealt with by the High Court."

From this order the wife appealed. In the course of the hearing of the appeal the evidence given before the justices was read out to the Divisional Court, which found that it was the wife's case that she had left home and decided never to return to cohabitation with her husband because of the matters alleged as persistent cruelty and that there was, therefore, an integral connexion, upon the face of the evidence, between the two charges of desertion and cruelty. There was a similar connexion between the charge of desertion and that of wilful neglect to provide reasonable maintenance.

W. R. K. Merrylees for the wife. In the circumstances of this case the court has jurisdiction to hear this appeal by virtue of section 11 of the Summary Jurisdiction (Married Women) Act, 1895. The justices' purported exercise of their powers under section 10 of the Act was a nullity, since, in the circumstances, there was no concurrent jurisdiction. The judgment of Lord Greene M.R. in *Perks* v. *Perks* [2] and of this court in *Smyth* v. *Smyth* [3] are authority for the proposition that the justices can only exercise their powers in respect of matters in which both the High Court and the justices have jurisdiction. Otherwise there can be no balance of convenience.

In the present case it is alleged that the husband deserted the wife in March, 1956, and it is clear beyond a peradventure that the High Court has no substantive jurisdiction as to that offence. Further, while the High Court has jurisdiction to deal with the charge of wilful neglect to provide reasonable maintenance under section 23 of the Matrimonial Causes Act, 1950, it has no jurisdiction to make an order for custody if the husband is found guilty of that offence.

It is conceded that, under the Act, the justices are entitled to refuse to make an order as to a matter which may be more conveniently dealt with by the High Court, but that is not what they have done in this case. They have refused to make an order because, in their view, one of the limbs of the ancillary relief sought may be more conveniently dealt with by the High Court. If an order is sought, as in the present case, on the basis of more than one offence, and there is concurrent jurisdiction in respect of one offence but not in respect of the others, the justices cannot adjudicate as to the latter and refer the former to the High Court. The words "or any of them" in section 10 refer to the parties and not to the matters.

---

[2] [1946] P. 1; [1945] 2 All E.R. 580.

[3] [1956] P. 427; [1956] 3 All E.R. 476.

Alternatively, the justices are not entitled to refuse to make an order as to an offence which is not more conveniently dealt with by the High Court simply because some other offence is charged in the same summons which is so. They have power to refuse to make only an order which comes within that category.

J. L. Elson Rees for the husband. According to section 5 of the Act, all the wife would have been entitled to, had she succeeded before the justices, would have been an order containing certain provisions. One then looks at section 10 of the Act, which refers to "an order," and it does not matter on how many grounds that order is obtained. If reference is made to the High Court, in circumstances such as the present, in respect of an order which the justices have refused to make, the possibility of any injustice being done because there is no concurrent jurisdiction as to one of the matters or offences charged can be adequately dealt with under the proviso to section 10.

If a wife makes a major charge of cruelty and joins charges of desertion and wilful neglect to provide reasonable maintenance arising out of it, and the major charge of cruelty may be more conveniently dealt with by the High Court, then it is proper that the whole matter should be so referred. To hold otherwise would entitle unscrupulous litigants to debar the justices from exercising their power at all by adding a charge of desertion.

The justices would have acted improperly if they had adjudicated in part and referred in part in this case. The various matters charged in the summons are almost certainly bound up with each other, and the justices acted correctly in referring the whole to the High Court.

LORD MERRIMAN P. stated the facts and continued: The question is, whether the justices were right to refuse to make an order, and if their correctness in doing so is in doubt, to put it neutrally, whether that is a proper subject-matter of appeal to this Division. [His Lordship referred to sections 10 and 11 of the Summary Jurisdiction (Married Women) Act, 1895, and continued:] The justices have plainly refused to make an order, and the question is whether it is one which is covered by the right of appeal under section 11, or whether it is "save as is "hereinbefore provided," namely, by section 10, where no appeal lies, and I think the matter can be quite shortly dealt with so far as the law of the case is concerned.

But first I would like to observe—(because I think it is vital, and I want this to be understood throughout the whole of my judgment)—that I do not think that it is possible to lay down cast-iron rules which are applicable to all cases—for example, one set of rules applicable where there is only one subject-matter and another set of rules applicable where there are two or more matters with or without two or more alternative forms of relief, and so forth. I think that the whole question of whether an appeal lies has to be judged on the facts of the particular case, which are particularly relevant on the point which I am just about to mention. For that reason, as I now think rightly, we insisted on reading the evidence in the case up to the point at which the decision to refuse to make an order and to send it up to the High Court was taken, because it brings out the point very clearly in so far as the facts relate to this particular case and not to any one or other of the many hypothetical cases which have been posed in the course of the argument.

The point to which I am directing my mind is that it was suggested that the words in section 10—"the matters in "question between the parties or any of them"—were of doubtful interpretation, and that it was very doubtful whether the words "or any of them" refer to "the matters" or refer to "the parties." Well, speaking for myself, I think putting it colloquially that this is as plain as a pikestaff. I think "the "matters in question between the parties" are hyphenated, and the words "or any of them" refer to "the matters" and not to "the parties." In other words, the point is whether the subject of litigation between the parties, whom the Act contemplates can only be two, namely, the husband and the wife—because that is the whole essence of this jurisdiction—can be sub-divided so that there are two or more matters in relation to which a choice to refer the decision to the High Court can more conveniently be made.

In this case, then, to bring the matter to a point and to a concrete case instead of a hypothetical one, there were three matters before the justices' court. There was the matter of the

1957

DAVIES v. DAVIES.

Lord Merriman P.

complaint of desertion, there was the matter of the complaint of persistent cruelty, and there was the matter of the complaint of wilful neglect to maintain, and it is true that in respect of all these there was the subsidiary matter—(and I am now speaking not collectively but of the individual matters severally) —with regard to each one of them whether this, that or the other order should be made in respect of that particular complaint, if found to be proved. But in my opinion the proper approach is to deal with the "matters" as being the several complaints, for I do not think, speaking generally—(though I do not think it is really in issue in this case)—that justices may decide that the complaint is proved and then refer to the High Court the matter of whether (a) a separation order should be made, (b) maintenance should be given, and, if so, how much, (c) whether the custody of the child should be given, and, if so, how much maintenance should be allocated in respect of that circumstance. I think the question is intended to be dealt with more generally. The "matters" are the subject-matters of these complaints, namely desertion, persistent cruelty and wilful neglect to maintain. If justices decide that any of these matters is more conveniently to be dealt with in the High Court, well and good, always assuming, as I will point out in a minute, that the High Court has jurisdiction to deal with it. But I do not think that, if the justices get to the stage of assuming the jurisdiction to decide the principal matter, there is any room for referring to the High Court what the consequential order should be in terms of money or in terms of custody or the like. I think the point is important, and is more practical than academic.

I indicated that perhaps it was academic, but it is not so in this case, for this reason, that it is quite plain that the justices have referred the whole of these three matters to the High Court because, if the wife had proved her case, which is left in doubt, one of the orders, manifestly, which she could get and which she was claiming, would be the custody of the child of the marriage, with consequential maintenance, and they have thought it better to avoid dealing with any of the matters because in respect of that particular issue they have no power—(and this is common ground)—to say that the child is not to be taken out of the jurisdiction. This is a practical proposition here, for on the evidence it is quite plain that this German wife, the widow of a German soldier killed in the war and afterwards married by a British soldier in the Army of Occupation, is only too anxious to get back to her native land with the child. I express no opinion whatever about the merits of that desire, and, indeed, I am going to express no opinion about the merits of any part of this case, because I think it is absolutely vital that the whole merits of the case, which is not by any means a simple one, should be left open.

I want to deal with the true interpretation of this section, and the question whether we are being asked to usurp a jurisdiction which the section says we are not entitled to exercise. We have been referred to two cases on this point, though neither has been read in detail. They are a decision of the Court of Appeal in *Perks* v. *Perks*,[1] and in particular the leading judgment of Lord Greene M.R.,[2] and a decision of this court, by which, of course, we are bound, in *Smyth* v. *Smyth*.[3] It will be remembered that the issue which is not appealable is a decision of the justices that the "matters" or any of them, that is to say—(and from now onwards I am going to interpret "matters" in the concrete)—the desertion, the cruelty, or the wilful neglect to maintain complaints, respectively, "would be more conveniently dealt with "by the High Court" than by themselves. That is the question in issue.

The decision of the Court of Appeal in *Perks* v. *Perks*[4] was that that very wording assumed that there was concurrent jurisdiction in both courts, and that it was a mere question of choice of the convenient forum to decide the particular matter. It is true that in *Perks* v. *Perks*[5] the question was the revocation of a maintenance order already made in a justices' court, and that the point was that there is no statutory power whatever in the High Court to revoke such an order, and consequently there was no concurrent jurisdiction and no question of choice of forum to which recourse might be had, because there was only one forum which had jurisdiction to revoke such an order, and that was the justices' court. That was developed a little more fully in the rather more complicated case of *Smyth* v. *Smyth*.[6] In my opinion it would be tedious to go through the details of that case. I am content to read one passage from the headnote, which, though I do not think it is taken verbatim from any particular judgment, is, in my opinion, an absolutely correct summary of the point of the case. It reads as follows [7]:—"*Per curiam*: In any matter where there is concurrent jurisdiction in a court of summary jurisdiction and in the High "Court,"—that is so far following what Lord Greene said in *Perks* v. *Perks* [8]—"that is to say, where the matter may be "investigated and determined by either court,"—that is the key to the passage in the headnote, that it is a condition precedent that the matter may be investigated and determined by either court—"then, if in the opinion of the court of summary jurisdiction the matter would be more conveniently dealt with by "the High Court, the court of summary jurisdiction may, under "section 10 of the Act of 1895, refuse to adjudicate, and there "is no appeal, subject to the proviso that the High Court may "send the matter back if it thinks fit." It is not disputed, and, in my opinion, rightly not disputed, that that is a perfectly correct interpretation of the case law as it stands at the moment, and it is not disputed that, if that condition, namely, that the matter may be investigated and determined by either court, is not fulfilled, then there is no concurrent jurisdiction, there is no choice between two possible forums, and appeal is allowable.

---

[1] [1946] P. 1; [1945] 2 All E.R. 580.

[2] [1946] P. 1, 3–7.

[3] [1956] P. 427; [1956] 2 All E.R. 476.

[4] [1946] P. 1.

[5] Ibid.

[6] [1956] P. 427.

That is how the matter stands as a matter of law. Therefore, in practice, coming again to the "matters" in question in this case, the question is whether these justices have rightly assumed that this is a case in which there are two equally convenient forums. I said a few moments ago that I think a question of this sort can only be properly investigated in the light of the real circumstances of the particular case, because there may be cases in which it might be possible to say that the lack of concurrence in the jurisdiction was wholly irrelevant, and I propose to deal with realities in this case. We have read, and I am glad that we have read, the evidence. About the merits of it I am not going to say one word beyond this, that it is as plain as anything can be why this multiplicity of issues is, in fact, integrally bound up together; that is to say—(and I am not deciding it)—it is as plain as anything can be why the desertion which, if it is desertion at all, is constructive desertion, may be directly affected by the view which the justices took about the charge of cruelty, for it is the wife's case that it is because of the matters of which she complained of as evidence of cruelty that she decided to leave home, and decided, as she says very plainly, never to return to cohabitation with her husband. Whether that is right or wrong is neither here nor there for the moment, but that there is an integral connexion between the two is plain on the face of the evidence. Moreover, it is equally plain that the question of wilful neglect to maintain may be integrally bound up with the wife's success or failure on the charge of desertion, for again I am only saying what is a possible view, not what is the right view. If she had no justification for leaving home it may be that she has put herself out of court, as a deserter, from obtaining maintenance on the ground of wilful neglect to maintain. I am not hinting or pretending to hint at what the decision should ultimately be. I am merely stating what is, in my opinion, an indisputable fact, and one, indeed, which is not disputed at all—that this is a case in which, as a matter of substance and of fact, these three complaints are, or certainly may be, to put it at its lowest, integrally bound up together.

---

[7] [1956] P. 427.

[8] [1946] P. 1.

The justices have declined jurisdiction to decide any one of them, and have sent the whole lot, lock, stock and barrel, to the High Court, chiefly because of the issue of custody, it is true, but they have sent the whole lot without any reservation, not sent part of one matter or another, or excluded one, or anything of that sort. They have sent the lot to the High Court.

If there is one thing which is plain beyond a peradventure, it is that the present case, which was tried on July 31, 1956, in respect of a separation which occurred on March 27 of the same year, is, in the aspect of desertion as such, one which could not properly be referred to the High Court, because, so far as I know, there is no substantive provision whereby the issue of desertion or not, three months before the date of the proceedings, can be brought before the High Court for any form of substantive relief. No doubt incidentally it might arise in other matters. It might arise as a discretionary bar, for example; it might arise for the purpose of reviving some antecedent offence which had been condoned, as in *Beard* v. *Beard*,[9] and so forth, but there is no substantive complaint for desertion for a period which is limited to three months which could properly be brought in the High Court.

It is true that the justices could have said, as a matter of construction of the section: "We will retain the matter "of desertion, because we realize that there is no concurrent "jurisdiction about that, but we will refer the persistent cruelty "and the wilful neglect to maintain"; but if they had done that they would have been plainly wrong, because no court can decide the question of desertion on the facts of this case without linking it up with the question of cruelty and the question of wilful neglect to maintain. That is only a development of what I have said before.

---

[9] [1946] P. 8; 61 T.L.R. 555; [1945] 2 All E.R. 306.

But they have not done that, so the case cannot be justified by a division of the "matters" under the section. They have referred the lot, and, in my opinion, this is so plainly wrong on the facts of this case that it is a matter for appeal because there is plainly no concurrent jurisdiction on the subject of desertion. This, for the reasons I have given, really lies at the root of the matter.

In my opinion we have no option but to reverse this order and send these matters back for determination in the justices' court.

I only want to add one other word, because great play has been made about the absence of any jurisdiction on the part of the justices to restrict any custody to the wife to this country, and to prohibit her from taking the child out of the jurisdiction. It is true that in other respects, too, justices have a limited jurisdiction as to custody. It required judicial decision, for example, to give them power to deal with the access of the other spouse, but one thing that is quite clear is that, except in certain special cases, they have no power to order custody to the husband under the summary jurisdiction code, as distinct from the Guardianship of Infants Act. It may very well be—though I do not say that it should be so—that if they think that a wife is going to smuggle the child out of the jurisdiction, the husband would be the proper custodian; but under this code they have no power to order that on a wife's complaint, just as they have no power to restrain the wife from taking the child out of the jurisdiction. How precisely they should deal with that is a matter for them if this question of custody becomes a vital issue, because the other complaints are not yet proved, about which I say nothing. But, in my opinion, as there is bound to be, one way or another, in this as in many other cases, some question of inconvenience in connexion with custody—I am dealing with this hypothetically now—assuming that they find that the question of custody arises because one or other of these charges is proved, I can see nothing wrong whatever in their saying: "We are not "going to make a custody order. We realize that we cannot refer "the question of custody on this particular complaint to the "High Court because that would be taking two bites at the "cherry; but what we can say is, that we leave the question of "custody to be dealt with by either party under the provisions "of one Act or jurisdiction or another, and in one court or "another, as they think is appropriate. We are not going to deal "with it," and, speaking for myself, I do not think that anybody could complain of that.

But for the moment we are not concerned with that. We are concerned with the right of this wife to have her three matters of complaint tried by these justices. In my opinion that is inescapable, and this appeal ought to be allowed.

WALLINGTON J. I agree, and having regard to the fact that the judgment just delivered by my Lord has completely covered every point that arises in the case, I do not find it necessary or desirable to add anything to it.

Appeal allowed and remitted to a fresh panel of justices for determination.

Solicitors: *Rhys Roberts & Co. for W. Davies & Jenkins, Llanelly; R. I. Lewis & Co. for Leslie Williams, Llanelly.*

E. J.

BROWN *v.* LLOYD (*orse.* BROWN) AND LLOYD.

1957
Jan. 24;
Mar. 28.

Karminski J.

Husband and Wife—Divorce—Delay, unreasonable—Adultery—Knowledge thereof—Separation of parties—Wife living in adultery for nine years prior to petition—Husband without knowledge of adultery until shortly before petition filed—Whether delay unreasonable—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 4 (2).

In considering whether there has been unreasonable delay in presenting a petition for divorce on the ground of adultery the test is whether the petitioner knew or had reason to believe that the respondent had committed adultery. There is no duty imposed by law upon a husband who lives separated from his wife to make inquiries as to her conduct unless he has some reasonable ground for suspecting that she is of an immoral or promiscuous disposition.

A husband and wife separated by agreement in 1940. The husband subsequently made no inquiries as to the conduct of the wife—whose behaviour while the parties were living together had never been such as to give rise to any suspicion on the part of the husband that she was of an immoral disposition—until 1956,

1957

BROWN
v.
LLOYD
(orse.
BROWN)
AND LLOYD.

when he discovered that she had been living in adultery since 1947. He then filed a petition for divorce on the ground of the wife's adultery:—

Held, that, since the husband had neither knowledge nor reason to believe that the wife had committed adultery until shortly before filing his petition he was not guilty of unreasonable delay.

Brougham v. *Brougham* [1895] P. 288 applied.

Drost v. *Drost and Hanson* [1942] 1 D.L.R. 72 not followed.

UNDEFENDED PETITION for divorce.

The parties were married in November, 1918; they lived together quite happily until a short time before the outbreak of war in 1939, when the husband and the wife were to some extent drifting apart. There was no evidence, and no suggestion, that the wife was then associating with or was interested in any other man, but the husband in his evidence said that she was cool towards him and that there was some degree of unhappiness. When war broke out in 1939 the parties were living in London, but from 1940 the wife went to live with her mother at Northampton, where she had lived before her marriage. From 1940 onwards the marriage, in fact, came to an end; there were no communications between the parties and they did not write to each other, and nothing happened in the nature of any association or communication between them for something like 16 years. The separation was consensual; the wife left the husband in 1940 because of the air-raids and because of the Government evacuation scheme, but they continued apart because neither wished to resume cohabitation with the other, nor did the wife ever ask the husband for any financial help, and he offered her none.

In 1956, realizing that he had been apart from his wife for 16 years and that it was perhaps desirable that something should be done about terminating the marriage, the husband journeyed to Northampton to find out what had happened. He saw his wife's sister and made some inquiries and then saw his solicitors. They wrote to the wife saying that they understood that she had obtained a decree of dissolution against the husband and had married another man. She wrote back saying that she had not divorced the husband and had not married anybody else. Further inquiries elicited the fact that the wife had been living in adultery with a Bertrand John Lloyd, the co-respondent, since about 1947. When Lloyd, the co-respondent, and the wife (who had taken the name of Lloyd) were interviewed, neither made the slightest attempt to conceal the fact they had been living together, by then, for nine years. Armed with that information the husband took action and filed a petition on the ground of desertion and adultery, dated November 6, 1956.

The matter came before Karminski J. on January 24, 1957, who heard the evidence and adjourned the case for the assistance of the Queen's Proctor on the question of delay. At the adjourned hearing on March 28, 1957, the allegation of desertion was withdrawn.

P. G. Mason for the husband. It is well established that to bar a petition for divorce on the ground of delay the court must find not merely lapse of time but unreasonable delay. Unreasonable delay can only start when the petitioner has knowledge of the fact or facts which entitle him to a remedy coupled with knowledge of his rights. There has been no case in the courts of this country in which it has been held that unreasonable delay has commenced to run while the petitioner was in ignorance of the relevant facts. As to *Drost* v. *Drost and Hanson*,[1] in which the court held the petitioner to have constructive knowledge of his wife's adultery, it is submitted that the doctrine of constructive knowledge is not appropriate to matters of status such as are the concern of this Division; the case is not binding on these courts and should not be followed.

In *Rutter* v. *Rutter* [2] it was held that failure to take action in respect of adultery prior in time to that alleged in the proceedings was not necessarily delay the reasonableness of which the court was under a duty to consider. That case may be prayed in aid in support of the submission that it would be improper to hold a petitioner guilty of unreasonable delay who is in complete ignorance of the offence.

No duty exists to test whether the complaining party has been guilty of unreasonable delay if the facts are merely that the marriage has broken down by consent or indifference; the imposition of such a duty would be quite impracticable. Nevertheless, it is conceded that if the facts are such that the reasonable petitioner would be bound to suspect that the respondent was committing adultery, he is under a duty to investigate, and if he fails to do so the court may hold that any delay thereafter is unreasonable. But that is not this case. The correct test for unreasonable delay is that laid down by Sir Francis Jeune P. in *Brougham* v. *Brougham*.[3]

---

[1] [1942] 1 D.L.R. 72.

[2] (1920) 123 L.T. 585.

[3] [1895] P. 288.

1957

BROWN
v.
LLOYD
(*orse.*
BROWN)
AND LLOYD.

Brian Neill for the Queen's Proctor. In every case in which the court has to consider unreasonable delay two questions arise. The first is: has there been delay? It is submitted that the conception of delay relates at the latest to the period between the inception of the adulterous association and the presentation of the petition. It is, however, conceded that where proceedings are brought on the ground of a second adulterous association, delay will (semble) run only from the inception of the later adultery. That is all that *Rutter* v. *Rutter* [4] decided. Once the court has decided that there has been delay it has to consider whether that delay was unreasonable. The test of unreasonableness is whether or not the delay was excusable. The petitioner's knowledge of the adultery is relevant to unreasonableness, and if there are no excusing factors for his inactivity he will be guilty of unreasonable delay. *Lowe* v. *Lowe* [5] and *Purton* v. *Purton and George* [6] are cases in which such circumstances were recently considered by the court, and an illustration of circumstances in which the delay was excusable is to be found in *Key* v. *Key and Staples.*[7] In all these cases the period of delay was held to run from the inception of the adultery, although it is true that in *Mortimer* v. *Mortimer* [8] delay referred only to the period between knowledge and the inception of proceedings.

This court regards delay with disfavour, for matrimonial offences are a matter of public concern and the court is not to be used by a party as an instrument of redress as and when it suits him: *Llewellyn* v. *Llewellyn.*[9] It is for the party who is in delay to convince the court that the delay was excusable, and the petitioner in the present case has not discharged that burden. It would not be possible or proper to lay down exact criterions as to the duties of a husband with regard to a wife from whom he is separated, but this husband should have been put upon inquiry as to the wife's mode of life. He has produced no excuse for the inactivity that has ripened into delay. This case is on all fours with *Drost* v. *Drost and Hanson,*[10] and, although that case is only of persuasive authority, it is a correct exposition of the law and should be followed.

---

[4] 123 L.T. 585.

[5] [1952] P. 376; [1952] 2 T.L.R. 505; [1952] 2 All E.R. 671.

[6] [1957] 1 W.L.R. 216; [1956] 3 All E.R. 952.

[7] [1957] 1 W.L.R. 220; [1956] 3 All E.R. 955n.

[8] (1820) 2 Hag.Con. 310.

[9] [1955] 1 W.L.R. 480; [1955] 2 All E.R. 110.

[10] [1942] 1 D.L.R. 72.

KARMINSKI J. stated the facts and continued: I have to consider whether the interval of 16 years between the separation and the petition, and in particular the interval of nine years between the adultery commencing with the co-respondent and the date of the petition, amount to unreasonable delay within section 4 of the Matrimonial Causes Act, 1950. This is not a case where it is suggested by the Queen's Proctor that the husband had actual knowledge of the wife's adultery before 1956, but it is obvious that, once he was furnished with that knowledge, he commenced proceedings almost at once. The point, which is not an easy one, is whether or not his abstention from making any sort of inquiries is, in itself, delay. The point in this case is that from 1940 to 1956 he made no inquiries at all. I have to consider, in a case of this kind, the nature of the delay and to find out first whether there has been delay and, secondly, whether, if there has been delay, it is unreasonable. There is the third question, if I find unreasonable delay, whether it is a case in which the discretion of the court should be exercised in favour of the husband.

The Queen's Proctor argued that delay relates to the period between the separation and the presentation of the petition and that the husband petitioner's knowledge is relevant to the question of unreasonableness, but he submitted that the real question relates back to the inception of the adultery.

There have been a good many cases decided in these courts and in the ecclesiastical courts in which the whole question of delay has been considered; but there is no reported case in the courts where unreasonable delay has been found unless actual knowledge by the complaining party has been proved. The industry of Mr. Neill, for the Queen's Proctor, has, however, discovered for me a decision in the Court of New Brunswick, *Drost* v. *Drost and Hanson.*[1] There the parties had separated in New Brunswick in 1936 and the wife respondent then left the husband petitioner with the children of the marriage and went to live at Bangor, in the same Province. The husband, in that case, apparently made no efforts to discover or ascertain the whereabouts of the wife between January, 1936, when she left him, and April, 1941, when he journeyed to Bangor and found that the wife was living with another man and had been living with that man for some years.

Baxter C.J. considered some of the English authorities, particularly *Mortimer* v. *Mortimer*,[2] and some of the later cases, including *Binney* v. *Binney and Hill*,[3] and he concluded his judgment in the following terms[4]: "The present case, of course, "does not come up to the two cases last cited, but I think the "delay was not introduced by the Act of 1857 but was merely "the expression of what had before been the practice of the "Ecclesiastical Court. Delay, therefore, as Sir William Scott "says 'demands a full and satisfactory explanation.' In the "present case the husband does not show a single thing that "he has done to ascertain the whereabouts of his wife from "January 14, 1936, until April, 1941. She had not gone to a "remote distance and I cannot conceive that it was impossible "for him to find out the conditions of her life at a much earlier "date. It seems to me that he simply waited until it was con"venient for him to bring his suit and then took a witness to "Bangor to ascertain facts which, if he didn't actually know "them previously, must have been easily capable of ascertain"ment by him." Baxter C.J. dismissed the petition.

---

[1] [1942] 1 D.L.R. 72.

[2] (1820) 2 Hag.Con. 310.

That case is an important one because, so far as the industry of counsel has discovered, it is the only one where the court has said that a petitioner is under a duty to make inquiries and may be guilty of delay if he fails to do so. The Queen's Proctor submits that that is a correct decision, and that in the present case there was unreasonable delay because the husband took no steps to find out where or how the wife was living.

There are certain similarities, obviously, between *Drost* v. *Drost and Hanson*[5] and the present case. In both cases there was no step taken by the husband to ascertain what his wife was doing, although in *Drost* v. *Drost and Hanson*[6] the period was considerably shorter than in the present one. In both cases there was no great distance separating the husband and the wife. In the present case the wife was living in Northampton and the husband in London, and it is not a case where she had disappeared to some remote foreign country.

I have to consider whether that decision is one which I ought to follow. It is not, of course, binding on me, although the decision of that court, given by Baxter C.J., must be of persuasive authority. So far as the English cases are concerned, they are silent, so far as I have been able to find out, on any suggestion as to the duty of a spouse separated from another spouse to keep the other spouse under some kind of observation. Mr. Neill, in his argument for the Queen's Proctor, was rightly careful in suggesting what the duties were under circumstances such as prevailed in the present case. The husband is under no sort of duty, as I see it, to make some sort of annual investigation as to the mode of life of the wife; particularly as in this case it is fair to say that the wife's conduct while they were living together never gave rise to any suspicion in the husband's mind that she was an immoral or promiscuous woman or even attracted by members of the other sex. Indeed, on the facts, as I know them now, she had lived a chaste life in Northampton for seven years after the separation between the husband and herself. This is not, therefore, a case in which I should hold that the husband was put on any sort of inquiry as to the wife's probable behaviour with other men.

---

[3] [1936] P. 178; 52 T.L.R. 481; [1936] 2 All E.R. 409.

[4] [1942] 1 D.L.R. 72, 74.

[5] [1942] 1 D.L.R. 72.

[6] Ibid.

Returning to the reported cases in this country, Mr. Mason, in his careful argument, has relied on *Brougham* v. *Brougham*.[7] That was a case where the parties had separated in 1871; it was proved, on the hearing of the Queen's Proctor's intervention, that between 1871 and 1879 the respondent wife had given birth to no less than three illegitimate children. In 1877 the husband petitioner had obtained from this court a decree of restitution of conjugal rights; the respondent wife did not defend that petition but was apparently present in court at the hearing. She never returned to her husband; certain financial consequences followed from that restitution decree, and there was evidence before the court on the Queen's Proctor's intervention that in 1880, that is after the restitution proceedings, a son of the husband told him that he, the son, had heard that the wife had had a child. In fact she had had three. The intervention was heard before Sir Francis Jeune P. and a jury, and some questions for the jury were discussed between counsel and the President. Sir Francis Jeune P. put the matter in this way[8]: "Where there is an issue as to unreasonable delay, I think that "there are two questions for the jury, namely, When did the "petitioner first know or have reason to believe that the respon-"dent had committed adultery? and, When did the petitioner first "take action in order to obtain a divorce? These facts having "been found, it is for the court to exercise its discretion." He referred[9] to *Nicholson* v. *Nicholson*[10] as an authority for holding that a delay of two years is unreasonable, and he added[11]:

---

[7] [1895] P. 288.
[8] Ibid. 289.
[9] Ibid.
[10] (1873) L.R. 3 P. & M. 53.
[11] [1895] P. 288, 289.

1957

BROWN v. LLOYD (orse. BROWN) AND LLOYD.

Karminski J.

"There is no magic in the period of two years; but, having "regard to the dates in this case, I think that the two questions "may, for simplicity's sake, in the present instance, be combined, and I propose to put this question to the jury: Did the "petitioner know or have reason to believe that the respondent "had committed adultery two years before he took action to "obtain a divorce?" Those two questions were put to the jury and they answered both in the affirmative[12] and the decree nisi was rescinded.

It will be observed that the words used by Sir Francis Jeune P. were: "Did the petitioner know or have reason to believe that "the respondent had committed adultery?," and that I believe to be the real test in these cases. If I had thought, on the facts, that the husband petitioner here had reason to believe that the wife had committed adultery before he went to Northampton in 1956 I would have taken a different view from that which I now take, but for the reasons which I have already given I do not think that he had any reason to believe that she had so committed adultery, bearing in mind that she had not been in the past a woman of promiscuous or immoral disposition. I therefore propose to follow the test laid down by Sir Francis Jeune P. in *Brougham* v. *Brougham*[13] although the facts of that case are widely different from the present, and Sir Francis Jeune P. was formulating questions for a jury; whereas I have to decide whether or not the conduct of the husband in the circumstances of this case amounts to unreasonable delay. With all possible deference to the decision of Baxter C.J., I do not propose to follow the test which he seems to have applied in that case. I do not think that there is in a case of this kind any duty on a husband to make inquiries after a separation as to a wife's conduct unless he has at least some reasonable ground, based on her past conduct or some rumours which may have reached him, to make those inquiries. Undoubtedly here the husband was not very energetic in the course he took, but, having at last committed himself to the extent of making inquiries at Northampton, thereafter he acted with speed. I find, therefore, that there has been in this case no unreasonable delay on the part of the husband. I therefore pronounce a decree on the ground of adultery.

Decree nisi.

Solicitors: *Montagu's and Cox & Cardale; The Queen's Proctor.*

E. J.

---

[12] [1895] P. 288, 290.

[13] [1895] P. 288.

RUSSELL v. RUSSELL AND ROEBUCK.

1957
Feb. 19, 20.

Sachs J.

Husband and Wife—Divorce—Residence—Cross-petition based on wife's residence — Husband found domiciled abroad — Wife's three years' ordinary residence in England—Suit instituted by husband—Jurisdiction to grant wife a decree—Suit instituted by wife—No jurisdiction to grant husband a decree—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 6, 18 (1) (*b*).

A husband petitioner who had prayed for a decree of divorce on the ground of adultery, and whose domicile of origin was in Scotland, was held not to have been domiciled in England when his petition was presented although the adultery was established. The wife in her answer prayed for a decree on the ground of desertion. She was found to have been ordinarily resident in England for three years immediately preceding the date of her answer and to have so continued; but the desertion which she alleged as ground for a decree was held not to have begun until a date less than three years before her answer although more than three years before the hearing.

The wife was given leave at the hearing to file a cross-petition on the ground of desertion from a date more than three years before the filing of that petition; the hearing was adjourned for the assistance in argument of the Queen's Proctor, and the husband was then deemed to have filed an answer to his wife's cross-petition whereby he prayed for a divorce on the ground of the proved adultery. It was established at the adjourned hearing that by the date of the wife's cross-petition the husband had acquired a domicile of choice in Eire and that the court therefore had jurisdiction under section 18 (1) (*b*) of the Matrimonial Causes Act, 1950,[1] to grant the wife a decree.

It was contended for the husband that to bring herself within the "proceedings" referred to in the subsection a wife must be the originator of those proceedings. For the wife it was contended that the court had no jurisdiction to grant a husband domiciled abroad a decree upon his answer to a petition in which a wife relied upon section 18 (1):—

---

[1] Matrimonial Causes Act, 1950, s. 18: "(1) Without prejudice to "any jurisdiction exercisable by the "court apart from this section, the "court shall by virtue of this section "have jurisdiction to entertain proceedings by a wife in any of the "following cases, notwithstanding "that the husband is not domiciled in "England, that is to say:—(*a*) in the "case of any proceedings under this "Act other than proceedings for presumption of death and dissolution "of marriage, if the wife has been "deserted by her husband, or the husband has been deported from the "United Kingdom . . . and the husband was immediately before the "desertion or deportation domiciled in "England; (*b*) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in "England and has been ordinarily "resident there for a period of three "years immediately preceding the "commencement of the proceedings, "and the husband is not domiciled in "any other part of the United Kingdom or in the Channel Islands or in "the Isle of Man."

Held, that (1) where relief is prayed for in an answer that answer is by virtue of section 6 of the Matrimonial Causes Act, 1950,[2] in the same position as a petition, and a wife is by that section accordingly entitled to avail herself of the provisions as to jurisdiction in section 18 (1) either by her answer or, a fortiori, by a cross-petition, although the petition with which the husband initiated the proceedings has failed for want of jurisdiction.

Faulkner v. *Faulkner*, 57 T.L.R. 628; [1941] 2 All E.R. 748 applied.

(2) The words "if he or she had presented a petition" in section 6 refer to a petition which is of its own merit within the jurisdiction of the court, and "proceedings" in section 18 (1) initiated by a wife do not therefore include a cross-prayer or cross-petition by a husband who is not domiciled in England.

Levett v. *Levett and Smith*, ante, p. 156; [1957] 1 All E.R. 720 applied.

(3) The court had therefore no jurisdiction to grant the husband relief, but would in its discretion in the special circumstances grant a decree to the wife.

DEFENDED PETITION for divorce.

The parties were married in 1935. The husband's domicile of origin was in Scotland, where he had lived for the greater part of his life prior to 1952, having lived in England for something less than a total of two years since 1946. At the end of 1952 the husband left Blackburn, Lancashire, where he was then living, and went to live in Bray, County Wicklow, Eire. The wife had been ordinarily resident in Yorkshire for many years.

In September, 1954, the husband, claiming that he was domiciled in England, filed a petition for divorce on the ground of adultery with the co-respondent Roebuck. The wife by her answer filed in March, 1955, denied the alleged adultery (as did the co-respondent) and prayed for a decree of divorce on the grounds that the husband had committed adultery in 1938 and had deserted her in December, 1951. She did not admit the husband's claim to be domiciled in England; and relied in an alternative on section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, as providing jurisdiction to grant her a decree. (A further allegation that the husband had deserted the wife while domiciled in England is not relevant to this report.)

The cause came before Sachs J. at the Leeds Summer Assizes in July, 1956. At the close of the evidence his Lordship, by consent, gave the wife leave to file a cross-petition, in which she alleged desertion from a date more than three years before that petition was filed, and in which she again relied on section 18 (1) (*b*) as regards jurisdiction. She did not pray the court for the exercise of its discretion in her favour.

---

[2] Matrimonial Causes Act, 1950, s. 6: "If in any proceedings for "divorce the respondent opposes the "relief sought on the ground of the "petitioner's adultery, cruelty or "desertion, the court may give to the "respondent the same relief to which "he or she would have been entitled "if he or she had presented a petition "seeking such relief."

On July 30, 1956, his Lordship found that the wife had been guilty of the adultery alleged in the petition, and that although the husband had not committed adultery as alleged he had deserted the wife in June, 1953, i.e., less than three years before the date of her answer to the husband's petition, but more than three years before the date of the cross-petition filed during the hearing. His Lordship was satisfied that the wife had been ordinarily resident in England for a period of more than three years immediately preceding both her answer and her subsequent cross-petition; but he held that at the date of the husband's petition the husband was not domiciled in England (without deciding at that stage whether he was domiciled in Eire or Scotland) and that there was, accordingly, no jurisdiction to grant the husband a decree on his petition.

At the conclusion of those findings the matter was adjourned by his Lordship to enable the wife to consider her position in regard to a discretion statement (which was filed before the adjourned hearing), and for the assistance in argument of the Queen's Proctor on the questions of discretion, domicile and jurisdiction.

At the adjourned hearing in London Sachs J. held that the husband's desertion in June, 1953, had not been affected by his knowledge of his wife's adultery with the co-respondent, and that by July, 1956, the date of the wife's cross-petition, he had acquired a domicile of choice in Eire, and that the provisions of section 18 (1) (*b*) were therefore applicable.

It was assumed for the purpose of argument at the adjourned hearing that the husband's position should be regarded as being the same as if he had also asked for relief by means of an answer to the wife's cross-petition in which he had prayed for a divorce upon the ground of the adultery which she had been proved to have committed.

The questions upon which this case is reported are upon the matters of jurisdiction, namely, whether the court had power under section 18 (1) (*b*) to grant a wife a decree of divorce in a suit instituted in England by a husband found domiciled abroad at that date, and whether in a suit instituted by a wife in England in reliance on that subsection the court might grant a decree to the husband respondent notwithstanding his foreign domicile.

Maxwell Gosnay for the wife. In the case of divorce proceedings instituted by a husband, a wife who prays for relief in her answer is by virtue of section 6 of the Matrimonial Causes Act, 1950, in the same position as if she had herself presented a petition. She may indeed include a cross-petition in the same document as her answer: *Pickett* v. *Pickett* (*orse. Moss*).[3] Accordingly, she may avail herself of the jurisdiction granted by section 18 (1) of the Act of 1950 even though respondent in that suit.

The jurisdiction under section 18, however, relates solely to proceedings by a wife, either by her petition, or in an answer which, it has been submitted, is equivalent to a petition. It does not extend the principle of jurisdiction according to domicile in the case of a husband.

H. G. Bennett for the husband. If the court is to " entertain " proceedings by a wife " under section 18 (1) she must be the originator of them, in the same way as she must have " brought " them under section 18 (2). Her proceedings here are consequential to those originated by the husband, and consequential proceedings are not " proceedings instituted ": *Hood Barrs* v. *Heriot*.[4]

Once proceedings have been initiated by a wife under section 18, the court has jurisdiction over the claims for relief of both parties, for such claims are part of those proceedings. The section should be construed broadly as one which can equitably grant relief to a husband whose wife has brought him before the court.

Colin Duncan for the Queen's Proctor. The answer is equivalent to a petition: section 6 of the Act of 1950. See *Faulkner* v. *Faulkner*[5] and *Volkers* v. *Volkers* (*Wingate cited*).[6] The section should be given a liberal interpretation in matters of procedure: *Barber* v. *Barber*.[7] But it is a procedural, not a jurisdictional section, and where jurisdiction is in question the court must be strictly satisfied. The submission on behalf of the wife is supported by *Chappell* v. *North*,[8] where the delivery of a counterclaim was considered a legal proceeding within the

---

[3] [1951] P. 267; [1951] 1 T.L.R. 585; [1951] 1 All E.R. 614.

[4] [1897] A.C. 177; 12 T.L.R. 288.

[5] 57 T.L.R. 628; [1941] 2 All E.R. 748.

[6] [1935] P. 33; 51 T.L.R. 87.

[7] [1954] P. 442; [1954] 2 All E.R. 307.

[8] [1891] 2 Q.B. 252; 7 T.L.R. 563.

1957

RUSSELL
v.
RUSSELL
AND
ROEBUCK.

meaning of the Arbitration Act, 1889. *Hood Barrs* v. *Heriot*[9] is to be distinguished.

The court has no jurisdiction to grant a husband who is not domiciled in England a divorce either in proceedings begun by a wife under section 18 or at all. The position is now covered by the reasoning in *Levett* v. *Levett and Smith*,[10] although that case in fact concerned an Englishman's decree of divorce in Germany.

T. R. Nevin for the co-respondent.

[The following cases were cited on the domicile issue: *Bell* v. *Kennedy*[11]; *Bowie* (*or Ramsay*) v. *Liverpool Royal Infirmary*[12]; *Winans* v. *Attorney-General*[13]; *Udny* v. *Udny*[14]; *Gulbenkian* v. *Gulbenkian*.[15]]

SACHS J. stated the facts, and after considering relevant authorities upon the issue of domicile, and referring to his finding at the earlier hearing that the husband had abandoned any nexus he might have had with England before his petition had been filed, continued: Having heard further argument on the point I am now prepared to and do go further in this respect; I hold that by July, 1956, which is now the relevant date, the husband had settled in Eire for an unlimited period, having no intention ever of going back to Scotland, and I hold that the correct inference is that his domicile at that date was in Eire. I have not excluded and do not purport to exclude the possibility that for good reasons or bad he may on some future occasion go elsewhere; I am only concerned with the proper inference to be drawn on the date I have mentioned.

I now turn to the issues of law as to the jurisdiction of this court which have been hotly contested by both sides. The husband contends that as the wife did not initiate the suit she cannot be given relief in it, and the wife contends that the court has no jurisdiction to accede to the husband's prayer for a decree.

The two sections of the Matrimonial Causes Act, 1950, which require consideration in regard to these arguments are sections 18 (1) and 6.

[His Lordship read the relevant words of the two sections and continued:] It is to be noted that section 6 of the Act of 1950 does not differ in its effect from the original section 2 of the Matrimonial Causes Act, 1866, or from its successor section 180 of the Supreme Court of Judicature (Consolidation) Act, 1925. Thus for some 70 years before the Matrimonial Causes Act, 1937, was passed by the legislature, the provisions of section 6 had provided the court with power to grant relief to a respondent in specified circumstances. It was section 13 of this latter Act which, with due knowledge of the power provided by section 180 of the Act of 1925, first conferred on this court in certain circumstances jurisdiction over "proceedings" by a wife against a husband who had deserted her having been immediately before such desertion domiciled in England but who was not domiciled in this country at the date the "proceedings" were initiated. That word "proceedings" was repeated in section 1 of the Law Reform (Miscellaneous Provisions) Act, 1949, and again in the codifying section 18 of the Act of 1950. On the other hand, the phrase within which that word was used has been slightly varied. In 1937 the phrase was ". . . for the purpose of any proceedings "under Part VIII of the principal Act, . . ."; in 1949 ". . . in "proceedings by a wife for divorce . . ."; and in 1950 ". . . to "entertain proceedings by a wife. . . ."

---

[9] [1897] A.C. 177.

[10] Ante 156; [1957] 1 All E.R. 720. (The case was heard after the initial argument in Leeds.)

[11] (1868) L.R. 1 Sc. & Div. 307.

[12] [1930] A.C. 588; 46 T.L.R. 465.

[13] [1904] A.C. 287; 20 T.L.R. 510.

[14] (1869) L.R. 1 Sc. & Div. 441.

[15] 54 T.L.R. 241; [1937] 4 All E.R. 618.

For the husband it is contended that the wife, to bring herself within section 18 (1), must be the originator of the proceedings in which she prays for a decree. Mr. Bennett contended that this must be so in the same way as "proceedings" must be "brought" by the wife under section 18 (2), and he argued that the word "brought" in that subsection has the same meaning as the word "instituted" was held to have in *Hood Barrs* v. *Heriot.*[1] Whatever may be the meaning of the word "brought" in section 18 (2), where the only possible originator of the suit could be the wife, the general answer to Mr. Bennett's point appears in *Faulkner* v. *Faulkner.*[2] There Hodson J. had to consider section 180 of the Act of 1925. In his judgment he stated[3]: "The answer takes the place of the petition in these "circumstances, and is in itself a petition praying . . . that the "marriage may be dissolved. . . ." Later he said[4]: "It seems "to me that an answer is in exactly the same position as a "petition. . . ." He accordingly held that the three years' desertion which was relevant in that particular case had to be calculated as from the date of the answer. That decision runs

---

[1] [1897] A.C. 177, 179.

[2] 57 T.L.R. 628.

[3] Ibid. 629.

[4] Ibid.

1957

RUSSELL
v.
RUSSELL
AND
ROEBUCK.

Sachs J.

parallel to that of *Chappell* v. *North*,[5] where the position of a counterclaim is dealt with. In addition, Mr. Gosnay referred me to *Pickett* v. *Pickett* (*orse. Moss*) [6] which says, as one would expect, that an answer and a cross-petition can be combined in one document.

The result is that a wife by virtue of section 6 is entitled to avail herself of the provisions of section 18 (1) by a prayer put either into an answer (or into a cross-petition contained in the same document), whether or not the husband's petition fails for want of jurisdiction. A fortiori, a wife may avail herself of those provisions in a cross-petition which has been consolidated with a petition presented by her husband.

I now turn to the point which mainly led me to ask for the assistance of the Queen's Proctor, namely, whether the combined effect of sections 18 and 6 is to entitle a respondent husband, who is not domiciled in this country, to obtain relief on establishing in answer to the prayer of a wife who has brought herself within the ambit of section 18 (1) (*b*) that the wife has committed adultery.

It is first to be noted that for the purposes of this particular case it was conceded as common ground that the husband's position should be regarded as being the same as if he had asked for relief by means of a cross-prayer to the wife's petition filed in July, 1956. That was common ground because, in principle, the court would, in such a case as the present, allow further appropriate pleadings to be filed so as to enable justice not to be defeated by procedural considerations. Indeed, the fact that the cross-petition here was filed on the agreed basis that all relevant matters raised by the husband in the course of these proceedings to that point were deemed to have been properly put on record in answer to the cross-petition, would render further pleadings otiose and, alternatively, would provide firm ground on which, even at this stage, to allow any necessary further pleading to be filed.

In essence the conflicting contentions put forward by the parties were, on the one hand, that, having regard to section 6, the words in section 18 (1) " entertain proceedings by a wife " should be read in respect of the petitioner's adultery, cruelty or desertion, all of which are pleadable as discretionary bars, as meaning " to have jurisdiction in relation to the proceedings for divorce " as if both parties were at the material times domiciled in

---

[5] [1891] 2 Q.B. 252.

[6] [1951] P. 267.

"England." (The phraseology is that formulated by the Denning Committee at paragraph 83 of their report in 1947.) On the other hand, it was argued on behalf of the wife that the relevant words "entertain proceedings by a wife," meant "to "have jurisdiction in proceedings initiated by a wife to grant "relief to her," and that section 6 did not affect that construction.

It has not unnaturally been argued that it would seem hard to a husband, and might even be distasteful to a court, that a wife, after praying for the exercise of the court's jurisdiction in the knowledge that any adultery of hers must be relevant, and after having unsuccessfully contested to the utmost the issue as to whether she was guilty of such adultery, should be able to turn round when she has failed on that issue and say that the court has no power to grant relief to the husband in accordance with the justice of the case. It could, indeed, be argued that a better example of heads I win and tails you get nothing would be hard to devise. But such an argument cannot prevail where the issue is purely one of construction as to the court's jurisdiction, and where the intentions of the legislature can be ascertained from the contents of the statute. Indeed, the court is chary of assuming jurisdiction over the matrimonial affairs of those not domiciled in this country in the absence of clear direction so to do.

The true construction of sections 6 and 18 (1) in regard to the point under consideration did, however, in the light of their history give me anxiety until the decision last week of the Court of Appeal in *Levett* v. *Levett and Smith.*[7] In that case the issue for determination was whether under the rules in *Travers* v. *Holley*[8] a decree of divorce in Germany was valid where it had been obtained on a cross-prayer by a husband whose wife had not proceeded with her petition for divorce on the ground of his alleged cruelty—the husband being domiciled in England and the wife having gone back to Germany and launched her claim there by virtue of some German enactment comparable to section 18 (1) (*b*) of the Matrimonial Causes Act, 1950.

It was argued before the Court of Appeal in that case that the foreign decree was good by virtue of the reciprocity rule to which I have just referred. It was decided, however, that the German decree could not be treated as valid in this country. The ground for the decision was that in this country section 18

---

[7] Ante 156; [1957] 1 All E.R. 720.

[8] [1953] P. 246; [1953] 2 All E.R. 794.

(1) (*b*) did not permit a foreign domiciled respondent to be granted relief on account of his wife's adultery where the court's jurisdiction to grant relief to a wife petitioner in the cause depended on that section. It was accordingly held to follow that there was no reciprocity as between section 18 and the German enactment on which the husband endeavoured to get his declaration.

In giving the leading judgment Hodson L.J. said[9]: "The "courts in this country under section 18 have jurisdiction to "entertain proceedings by a wife. It is true that the meaning "of the word 'proceedings' may vary according to its context, "and from one authority to which our attention was drawn, "*Pryor* v. *City Offices Co.*,[10] a decision of this court, it is "quite clear that the word 'proceedings' may cover the whole "of the proceedings in question, beginning with the claim and "including a counterclaim. It does not follow, to my mind, at "all that in the context here, in considering the question of "proceedings being entertained by a wife, the word 'proceed-"'ings' includes anything that may follow in the same suit. "The position is, I think, exactly the same as if Parliament had "used more homely language and said that the court should "have jurisdiction to listen to a request or to hear a claim by a "wife for a particular form of relief. That approach to this "section makes it quite impossible to hold that a husband coming "in, in answer to a wife's claim, could get himself under the "umbrella of this section so as to make use of the argument "based upon reciprocity."

Later in the same judgment Hodson L.J. said[11]: " . . . the "position contemplated by section 6 is the position of a person "who seeks for relief in the answer being put in the same "position as if he or she had presented a petition seeking the "same relief; and, applying that to this case or to a case "parallel with this, which was put by Lord Evershed M.R. in "the course of the argument, taking the case of a wife deserted "in this country by a man who disappeared and went to one "of the United States of America, she would be entitled prima "facie to rely on section 18 of the Act of 1950, but the husband "would not be in a position in his answer to present a petition "seeking relief, namely, divorce, unless he was domiciled in "this country. To my mind, no assistance can be gained from

---

[9] Ante 162.

[10] (1883) 10 Q.B.D. 504.

[11] Ante 163.

"section 6, in the sense that it can be said that section 6 of the "Act of 1950 governs the operation or the effect of section 18."

Although the Court of Appeal did not have before it a cause which had actually been brought in this country by virtue of section 18 (1), the ratio decidendi of *Levett* v. *Levett and Smith* [12] undoubtedly applies to the issue of jurisdiction in the present case. It decides conclusively that section 6 is procedural, a point inherent in the reasoning of the previously cited judgment in *Faulkner* v. *Faulkner* [13]; that the words in section 6 "if he "or she had presented a petition" refer to a petition which is of its own merit within the jurisdiction of the court; and that "proceedings" in section 18 (1) do not include a cross-prayer or cross-petition by a respondent husband who is not domiciled in this country.

Accordingly, the husband's prayer in the present case fails because the court has no jurisdiction to grant the relief he claims.

Having come to the conclusion that the court has no jurisdiction to grant a decree to the husband the only remaining question is whether the wife should, in the exercise of the court's discretion, be granted a decree upon her cross-petition.

[His Lordship then considered the matters relevant to the exercise of the court's discretion, including the fact that the wife had filed a discretion statement admitting adultery in September, 1956, and decided that in the special circumstances of the case discretion should be exercised in the wife's favour and the marriage dissolved. He accordingly granted a decree nisi on the ground of the husband's desertion.]

Decree nisi on prayer of wife's cross-petition.

Solicitors: *Kershaw & Farley, Blackburn; Fergusson & Gardner, Dewsbury; Ramsden, Sykes & Ramsden, Huddersfield; The Queen's Proctor.*

J. B. G.

---

[12] Ante 156.

[13] 57 T.L.R. 628.

N. *v.* N.; L. *v.* L.; C. *v.* C.

1957
Jan. 28;
Feb. 7.

Sachs J.

Husband and Wife — Divorce — Death — Service of petition for decree of presumption of death and dissolution of marriage — Leave to dispense with service—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 16 (1) (2)—*Matrimonial Causes Rules,* 1950 (*S.I.* 1950, *No.* 1940 (*L.*27), *r.* 9 (5)).

In these three cases the petitioners sought leave to dispense with service upon the respondents of petitions praying for decrees of presumption of death and dissolution of marriage under section 16 of the Matrimonial Causes Act, 1950. The respondent in each case had last been seen or heard of during the war in territories which were or had become within the U.S.S.R., and exhaustive efforts to trace the respondents, short of attempts which might have involved risk to others, had failed:—

Held, (1) that the court should not be astute to find reasons at the outset of proceedings under section 16 why the petitioners should incur expense under orders for substituted service by advertisement when, prima facie, the chances of its producing a result were in substance nil, but should be cautious lest it unnecessarily embark on issues and inquiries which could more properly and more successfully be dealt with at the trial. The position in cases under section 16 was different from that in cases under sections 1 and 4, for in exercising his discretion under section 16 to grant a decree the trial judge considers all the available evidence, including oral evidence, relating to the disappearance of the respondent spouse, and may in appropriate cases adjourn the matter for further inquiries; whereas upon other petitions for divorce no further occasion normally arises for investigating the chances of the respondent spouse being found, once leave has been given to dispense with service.

(2) That upon such applications the risk to others of further inquiries can properly be regarded as a factor affecting the discretion of the court; if a certain course might result in great and irremediable harm, that possibility must obviously have potent weight in determining what is expedient.

(3) That the present were cases in which it was proper to grant leave to dispense with service.

Luccioni v. *Luccioni* [1943] P. 49; 59 T.L.R. 202; [1943] 1 All E.R. 384; *Chard* v. *Chard* [1956] P. 259; [1955] 3 All E.R. 721; and *Thompson* v. *Thompson* [1956] P. 414; [1956] 1 All E.R. 603 considered; *Spalenkova* v. *Spalenkova* [1954] P. 141; [1953] 2 All E.R. 880 distinguished.

SUMMONSES (adjourned into court).

In these three cases the petitioner husbands had applied for leave to dispense with service under rule 9 (5) of the Matrimonial

1957

N. v. N.
L. v. L.
C. v. C.

Causes Rules, 1950,[1] of petitions for decrees of presumption of death and dissolution of marriage under section 16 of the Matrimonial Causes Act, 1950.[2] Their wives had last been seen or heard of during the war in territories now within the U.S.S.R., and all efforts to trace them had failed. There was evidence that further inquiries, or advertisements, might result in risk to others. The relevant facts of the three cases are set out in the judgment.

The summonses were adjourned into court and the assistance in argument of the Queen's Proctor was invoked.

Colin Duncan for the Queen's Proctor. The rules should not be relaxed merely because these applications concern petitions for presumption of death and dissolution of marriage under section 16 of the Act of 1950. *Maxted* v. *Maxted*[3] shows that the normal practice is to order service by advertisement. Such advertisements will also act as a check upon a fraudulent petitioner who is deliberately attempting to mislead the court. But in cases such as these, where the respondents were last heard of behind the Iron Curtain, service may perhaps more readily be dispensed with, especially if such service might result in danger to others.

The position in the present cases is clearly to be distinguished from that in cases such as *Spalenkova* v. *Spalenkova*,[4] where the petition was based on desertion and the respondent was a political prisoner who might later be released.

The object of section 16 is essentially to enable the petitioner to know his status, rather than to alter that of the respondent, and the court need not be too astute at the outset to find reasons why he should incur the expense of advertisements. But there can in any event be no fettering of the court's discretion: *Luccioni* v. *Luccioni*.[5] [*Paolantonio* v. *Paolantonio*,[6] *Read* v. *Read*[7] and *Heath* v. *Heath*[8] were also referred to.]

---

[1] Matrimonial Causes Rules, 1950, r. 9 (5): "Service may be dispensed "with altogether in any case in "which it may appear necessary or "expedient to do so. An application "for leave to dispense with service "on a respondent spouse shall be "made to a judge and an application "for leave to dispense with service in "any other case shall be made to a "registrar."

[2] Matrimonial Causes Act, 1950, s. 16: "(1) Any married person who "alleges that reasonable grounds "exist for supposing that the other "party to the marriage is dead may, "if he is domiciled in England, "present a petition to the court to "have it presumed that the other "party is dead and to have the "marriage dissolved, and the court, "if satisfied that such reasonable "grounds exist, may make a decree "of presumption of death and of dissolution of the marriage. (2) In "any such proceedings the fact that "for a period of seven years or "upwards the other party to the "marriage has been continually "absent from the petitioner, and the "petitioner has no reason to believe "that the other party has been living "within that time, shall be evidence "that he or she is dead until the "contrary is proved."

[3] [1956] 1 W.L.R. 1501; [1956] 3 All E.R. 695n.

[4] [1954] P. 141; [1952] 2 All E.R. 880.

Michael Sherrard for the petitioner N. Leave to dispense with service is a discretionary matter and reported cases can only point the road. But there is a clear distinction between cases such as *Spalenkova* v. *Spalenkova*[9] and petitions under section 16, in particular when the only advertisements which could possibly be effective would be behind the Iron Curtain. It is possible in cases under section 16 to look at the affidavits supporting the application, and at the petition, and to consider what are the possibilities of effective service, even if the respondent were alive. All reasonable inquiries on behalf of the petitioner N. have already been made. Even if it were possible to advertise (and inquiries show this unlikely) such advertisements might endanger relatives.

[SACHS J. To what extent is it relevant upon an application relating to a petition under section 16 that the facts alleged on the application will be in direct issue at the hearing, when the trial judge could adjourn the matter for further inquiries if not satisfied?]

It is submitted that no more than a prima facie view is needed at this stage, and that such a case has been made out in the affidavits: the trial judge will be able to test the petitioner's case upon his oral evidence.

The presumption arising from section 16 (2) should also be applicable to applications to dispense with service.

[SACHS J. Might that not involve leave being given almost automatically?]

No: it would depend on the circumstances, for there must be some evidence to show the application to be reasonably well founded.

N. C. Lloyd-Davies for the petitioners L. and C. Rule 9 provides, as did section 42 of the Act of 1857, for dispensation of service when it may appear necessary or expedient. "Expedient" is a word giving very wide powers. *Maxted* v. *Maxted*[10] is no more than a practice ruling in the circumstances of that case and no question of principle was argued.

---

[5] [1943] P. 49; 59 T.L.R. 202; [1943] 1 All E.R. 384.

[6] [1950] W.N. 355; 66 T.L.R. (Pt. 2) 235; [1950] 2 All E.R. 404.

[7] [1942] P. 87; 58 T.L.R. 160; [1942] 1 All E.R. 226.

[8] [1950] P. 193; 66 T.L.R. (Pt. 1) 1093; [1950] 1 All E.R. 877.

[9] [1954] P. 141.

[10] [1956] 1 W.L.R. 1501.

Under section 16 the petitioner is primarily seeking not to change his status but to obtain a declaration as to his position, with the safeguard of a divorce decree if the respondent is later discovered alive: *Wall* v. *Wall*.[11] The court may therefore approach applications to dispense with service from a different standpoint. [*Luccioni* v. *Luccioni*[12] was referred to, where desertion was in issue.]

If the investigations set out in the affidavit and the petition are likely, if accepted, to be found sufficient for a decree, the further preliminary of an advertisement would seem unnecessary. If the petitioner is committing perjury, it can best be tested and discovered upon his oral evidence at the hearing.

It is submitted that having regard to the wide powers of "expediency" in the rule, and the different nature of the relief sought, leave to dispense with service should be regularly given in section 16 cases, or that it should at least only be refused if the court found some special reason on the evidence before it.

Colin Duncan in reply.

Cur. adv. vult.

SACHS J., reading his judgment, said: In each of these three cases a petitioner husband is applying by virtue of rule 9 (5) of the Matrimonial Causes Rules, 1950, to dispense with service on the respondent wife: in each case the sole relief now claimed in the petition is for "a decree of presumption of death and of "dissolution of the marriage" under section 16 of the Matrimonial Causes Act, 1950; in each case it is alleged to be considerably more than seven years since the wife was last heard of by the husband; and in each case the wife when last seen or heard of was in territory that is now within the U.S.S.R.

The petitions were placed on the file of this court in October and November, 1956. Each of the husbands having by then been resident in this country for upwards of eight years claims to be domiciled here. In none of the three cases is there any issue of the marriage.

The salient facts, apart from those already mentioned, of the respective cases as stated in the documents before me are as follows:

---

[11] [1950] P. 112; 65 T.L.R. 731; [1949] 2 All E.R. 927.

[12] [1943] P. 49.

In *L.* v. *L.* the parties, after their marriage, had lived together in a forest area in Latvia and continued so to do until the summer of 1944, when the area in question was entered by the German army. The husband was then compulsorily enlisted into a unit of that army and almost immediately sent to Germany, where he served until the date of the surrender to the Western Allies in May, 1945. Some three years later he came to England, has lived here since then, and states that he intends to make this country his permanent home. Shortly after his unit was sent to Germany, the area in which he had been living was occupied by troops of the U.S.S.R., and since that date he has neither seen nor heard of his wife. Various efforts have been made by the husband to get into touch with his wife, and indeed he appears to have exhausted all means of getting into contact with her and hearing of her, short of those which might have an adverse effect on the safety of other persons. None of his efforts have produced any result.

In *C.* v. *C.* the parties lived after their marriage in a farm area in Latvia until the husband, like the husband in Case No. 1, came to be compulsorily enlisted in a unit of the Germany army. He, too, was sent with that unit to Germany, surrendered to the Western Allies in May, 1945, and after a matter of a couple of years came to England. He, too, has remained here ever since and states that he intends to make this country his permanent home. Shortly after his unit had left for Germany there was heavy fighting over the area in which he had lived and it is stated that it is possible that in this fighting the respondent wife was either taken prisoner or killed. Whatever may be the weight to be attached to this possibility, the facts show that the husband has not since he left for Germany seen or in any way heard of his wife. As in the case of husband No. 1, he has made a number of efforts to trace her, and according to the statements in his petition and affidavit, has exhausted all steps that can be taken to trace her short of such as might involve risk to others. Accordingly, on the facts in evidence before me, both he and husband No. 1 have availed themselves of every reasonable means to ascertain whether their respective wives are still alive.

In *N.* v. *N.* the parties after their marriage lived at a town in the U.S.S.R. until the summer of 1941. That town was then bombarded by the Germans and in the general disturbance that resulted the wife became very frightened and found a place in a lorry which was evacuating people from that town. Her intention was to go to her parents' home in a far distant town. The route between the two towns was heavily bombed at the time of the wife's journey, and when the husband reached his parents-in-law's house some time later he found, according to his statement, that his wife had not arrived. Searches and inquiries over a considerable period failed to provide any information enabling him to trace his wife. Some years later the husband came to England and, like the husbands in Cases Nos. 1 and 2, has settled here. Whilst in this country he, too, has made considerable inquiries which are detailed in his affidavit, and has exhausted all means of tracing his wife short of employing methods which might involve risk to others. In his petition as originally presented to this court there was added to the prayer under section 16 of the Matrimonial Causes Act, 1950, an alternative allegation that if the wife was still alive she had been, in the premises, guilty of desertion: but that inconsistent allegation, which was not tenable on the facts put forward in the affidavits, was abandoned whilst the present application was before me, and the relevant allegation struck out of the petition.

From the facts as stated it is clear that in each case the court at trial may be asked to say that it falls within section 16 (2). [His Lordship read the subsection and continued:] In Case No. 3, however, the husband is likely to ask for the inference of the wife's death to be drawn independently of that subsection; in Nos. 1 and 2 the husbands might perhaps take a similar course, but this I rather doubt.

Since *Chard* v. *Chard*,[1] it appears that the practice of the Superintendents-General acting under the Marriage Act, 1949, has been modified where, in circumstances such as those in the present cases, the issue of a certificate of marriage is sought by someone who has already been once married to enable him or her to remarry despite no death certificate being available to establish the demise of the other party to that previous marriage. I was further informed that the production of a decree obtained under the provisions of section 16 is thus now more frequently needed before the remarriage can take place; that questions as to the service of petitions in cases similar to those under consideration may well recur frequently; and that there was no reported decision on the points which it was desired to argue in the present cases. Accordingly, the applications were adjourned into court and the attendance of the Queen's Proctor was invoked under the provisions of section 10 of the Act of 1950.

---

[1] [1956] P. 259; [1955] 3 All E.R. 721.

As usual, Mr. Colin Duncan has provided much assistance in the course of his argument; and amongst the authorities helpfully placed before the court I would first refer to *Luccioni* v. *Luccioni*,[2] where it was emphasized that whilst it can be helpful in relation to an application under rule 9 (5) of the Matrimonial Causes Rules, 1950,[3] to provide indications of what matters have affected the court in exercising its discretion, nothing in the way of rules fettering that discretion should be or indeed could be laid down. That principle, of course, applies with full force to applications such as those now before the court.

As, however, none of the judgments cited has dealt with the application of rule 9 (5) to a case where a decree of presumption of death was sought, I now turn to the provisions of section 16 to consider whether petitions brought thereunder may give rise to special factors in regard to the applications before me: for whilst all other decrees of divorce are pronounced on the footing that the respondent is alive, the court when acting under that section assumes the identically opposite fact. The relief that can be granted under section 16 is, for that and for other reasons, in many respects sui generis—as was cogently pointed out by Pearce J. in *Wall* v. *Wall*.[4]

The nature of such a petition necessitates in every instance an application to the court on the question of service. Then the court has to choose between the alternatives of making an order (a) dispensing with service under rule 9 (5) or (b) for some form of substituted service under rule 9 (3) and (4); and as regards the latter the very phrase "to order substituted service "on a person whom it is sought to be presumed dead" has a somewhat odd ring and points to the need for a guarded approach to the problem.

It is convenient here to refer back to two points under section 16 which were raised by the Queen's Proctor in the course of the argument in *Thompson* v. *Thompson*.[5] First, he desired to reserve the point as to how far the court is, under subsection (2) of section 16, entitled to or obliged to take account of the absence of full inquiry in relation to the words "reason to believe." Secondly, he submitted that under subsection (1) the word "may" in relation to the making of a decree imported that the court had a discretion whether a decree should be granted, even where, for instance, the requirements of subsection (2) had been fulfilled.

---

[2] [1943] P. 49.

[3] Formerly under s. 42 of the Matrimonial Causes Act, 1857, which was repealed by rule 82 of the Matrimonial Causes Rules, 1950.

[4] [1950] P. 112.

[5] [1956] P. 414, 416, 417; [1956] 1 All E.R. 603.

The first of these points it is unnecessary here to discuss: but the second, which I accepted,[6] has a manifest bearing on applications to dispense with service. In aid of the exercise of the court's discretion in a section 16 case the trial judge has the benefit of that information on the steps taken to trace the respondent, which by rule 4 (j) must be set out in the petition: upon considering the available evidence as to the disappearance of the respondent the trial judge may, and in appropriate cases no doubt will, refuse to grant a decree unless and until appropriate further inquiries have been made, and at that stage the case can be adjourned for those inquiries to be set on foot through advertisements or otherwise: and, by virtue of having witnesses before it, the court at trial is frequently in a better position to assess the need or otherwise for further inquiry than a chambers judge looking at affidavits. In this respect the court's powers to ensure that all reasonable inquiries have been made is perhaps analogous to that exercised in the Chancery Division upon an application for a Benjamin order enabling an estate to be distributed on the footing that a beneficiary who has disappeared is dead.

To that extent petitions under section 16 differ from those where a decree is sought under the provisions of sections 1 and 4 of the Act: for instance, where the petition is for a decree on the grounds of cruelty or, indeed, of desertion against a spouse who is alleged later to have vanished, once service has been dispensed with by the court no further occasion normally arises for investigating the chances of that spouse being found. In the light of that difference it seems to me that a court, when considering an application to dispense with service in a section 16 case in which all proper inquiries have prima facie been made, should be cautious lest it may unnecessarily embark on issues and inquiries which can more properly and more successfully be considered at trial.

Further, to my mind, there is force in Mr. Colin Duncan's submission that the general intent of section 16 is to enable a petitioner to lay before the court such facts as are known to him, in order that he may ascertain whether or not they enable him to be granted what is in some respects a declaration as to their effect: and that, accordingly, the court, whilst remaining carefully conscious that the status of the respondent may be affected, should not be astute to find reasons at the outset of the proceedings why the petitioner should incur expense under orders for substituted service by advertisement when, prima facie, the chances of its producing a result are in substance nil.

---

[6] [1956] P. 414, 425.

As regards any danger in section 16 cases of an attempt to mislead the court by concocted evidence, such chances as there may be of parrying such an attempt seem likely to be greater as a rule at trial than in chambers: and further, such cases are unlikely to be in number sufficient to justify of themselves imposing in every case an otiose expense on all honest petitioners under the section.

I am, however, far from acceding to Mr. Lloyd Davies' submission that in section 16 cases there either is or should be an automatic rule that service should be dispensed with; or his alternative suggestion that in such cases service should be dispensed with unless the court found on the evidence that such service was necessary. That would contravene both the wording of rule 9, which puts the onus on the petitioner to bring himself within sub-rule (5), and the principle laid down in *Luccioni* v. *Luccioni*[7] that no rules may fetter the court's discretion. On the contrary, each case must be dealt with on its merits.

But the matters indicated above do constitute factors which may affect the exercise of the court's discretion under that rule, and may in quite a range of cases lead to the result that service can properly be dispensed with where relief is being sought under section 16.

I now return to the facts disclosed in the present series of cases. In each of them an order for substituted service by advertisement would be worthless: no other form of substituted service has been suggested: all available inquiries have, prima facie, been made: and, as it is wholly impracticable on an application in chambers to look behind the prima facie evidence here, in the light of the points discussed above those factors of themselves lead to the conclusion that it is expedient within rule 9 (5) to dispense with service.

I should perhaps add that the present cases are in more than one respect the converse of *Spalenkova* v. *Spalenkova*,[8] where a respondent known to be alive and a political prisoner was charged with desertion, and where, further, the chances of a future change in his circumstances were deemed worth taking into consideration.

---

[7] [1943] P. 49.

[8] [1954] P. 141.

1957

N. *v.* N.
L. *v.* L.
C. *v.* C.

Sachs J.

It was also submitted both by Mr. Colin Duncan and by Mr. Lloyd Davies that the risks to others to which I have earlier referred can properly be regarded as a factor affecting the discretion of the court. With that submission I agree: if a certain course may result in great and irremediable harm, that possibility must obviously have potent weight in the scales used to determine what is expedient.

Accordingly, I order that service be dispensed with in each case, and understand that in so doing I am doing nothing inconsistent with any known previous decision in chambers.

Leave to dispense with service granted.

Solicitors: *Hunters (in N.* v. *N.); Beckingsales (in C.* v. *C. and L.* v. *L.); The Treasury Solicitor.*

J. B. G.

END OF VOLUME AND OF PROBATE SERIES FOR 1957.

The Mode of Citation of the Volumes of the *Law Reports* for 1957, is as follows:—

[1957] Ch. [1957] P.
[1957] 1 Q.B. [1957] 2 Q.B.
[1957] A.C.

INDEX

ADMIRALTY — Damages — Interest. See Practice—Payment into court.

2. —— *Jurisdiction — Carriage of goods — "Claim arising out of any agreement" — Whether covering claim in tort so arising—Bills of lading antedated—Claim by transferee against ship—Administration of Justice Act,* 1956 (4 *&* 5 *Eliz.* 2, *c.* 46), *s.* 1 (1) (*h*).
Admiralty—Jurisdiction—Action in rem—Whether necessary to prove liability in personam at outset—Motion to set aside writ and warrant of arrest—Administration of Justice Act, 1956, *s.* 3 (4).
Schwarz & Co. (Grain) Ltd. *v.* St. Elefterio ex Arion (Owners). The St. Elefterio **Willmer J. 179**

ADULTERY—Consent—Intervener aged 12. See Husband and Wife.

2. ——. See Husband and Wife.

APPEAL—From justices. See Husband and Wife.

BANKRUPTCY — *Sequestration — Husband and wife — Order for maintenance — Writ of sequestration issued in respect of husband's failure to pay—Subsequent bankruptcy of husband—Summons by trustee in bankruptcy to discharge writ—Husband in contempt of court at hearing of summons—No cause for discharge of writ—Bankruptcy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 37 (1).
Coles *v.* Coles - - **Collingwood J. 68**

BARRISTER—Fees. See Legal Aid.

CONDONATION. See Husband and Wife.

CONDUCT CONDUCING — to desertion. See Husband and Wife—Conduct conducing.

2. ——. See Husband and Wife.

CONFLICT OF LAWS—Divorce—Recognition of foreign decrees. See Husband and Wife—Divorce.

2. —— Effect of foreign divorce on maintenance order. See Husband and Wife—Maintenance.

CONFLICT OF LAWS—*continued.*

3. —— Jurisdiction — Divorce. See Husband and Wife.

4. —— *Marriage — Validity — Common law marriage — Forces abroad — Occupation of foreign territory—Polish forces in Italy—Marriage between Poles—"Discipline and internal "administration" — Formalities not in compliance with lex loci celebrationis—Marriage valid at common law—Foreign Marriage Act,* 1892 (55 *&* 56 *Vict. c.* 23), *ss.* 1 *and* 22, *as amended by the Foreign Marriage Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 33), *s.* 2—*Allied Forces Act*, 1940 (3 *&* 4 *Geo.* 6, *c.* 51), *s.* 1 (1)—*Polish Resettlement Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 19), *s.* 9 (2) (8).
Military Law—Allied forces—Polish resettlement.
Taczanowska (orse. Roth) *v.* Taczanowski **Karminski J. and C.A. 301**

CONTEMPT—Discharge of writ of sequestration. See Bankruptcy.

2. —— Maintenance—Failure to pay school fees. See Husband and Wife—Maintenance.

CONTRACT—Towage—Enforcement by third party. See Shipping—Limitation of liability.

COSTS—Taxation. See Legal Aid.

DAMAGES—Co-respondent's means not admissible. See Husband and Wife—Adultery.

2. —— Tax element. See Shipping.

DESERTION—Adultery by petitioner. See Husband and Wife—Desertion.

DIVORCE—Disclosure of petitioner's adultery after decree nisi. See Husband and Wife.

ESTOPPEL—*Per rem judicatam—Husband and wife — Divorce — Petition by husband alleging perjury by wife in previous maintenance proceedings—Dismissal of wife's charge of cruelty in maintenance proceedings—Wife repeating charge of cruelty against husband in answer to his petition in divorce—Application*

ESTOPPEL—*continued.*

to strike out allegations of cruelty—No estoppel binding the court in divorce jurisdiction.
Husband and Wife—Practice (in matrimonial causes)—Pleading—Rules to be observed.
THOMPSON *v.* THOMPSON - - **C.A. 19**

2. —— Res judicata—Paternity. See HUSBAND AND WIFE—Maintenance.

EVIDENCE—As to co-respondent's means—Not admissible as to damages. See HUSBAND AND WIFE—Adultery.

HUSBAND AND WIFE—*Adultery—Consent—Intervener aged* 12 *years—Whether capable of adultery.*
Mr. Commr. Temple Morris Q.C. 78

2. —— *Adultery — Damages — Co-respondent's means—Materiality—Wife found to be moving spirit in adulterous liaison—Circumstances material for assessment of damages—Evidence as to co-respondent's means not receivable.*
SCOTT *v.* SCOTT AND ANYAN - - **C.A. 1**

3. —— *Alimony pendente lite—Assessment of amount—National assistance by wife—Court entitled to take assistance benefit into consideration—No order for alimony—National Assistance Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *ss.* 42, 43—*Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 19.
National Assistance.
STERNE *v.* STERNE - - - - **C.A. 168**

4. —— *Conduct conducing—Desertion, to—Conduct less than just cause—Conjugal unkindness—Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 4 (2) (*iv*).
POSTLETHWAITE *v.* POSTLETHWAITE
Willmer J. 193

5. —— *Desertion—Adultery by petitioner—Adultery before inception of desertion—Whether absolute bar to finding of desertion—Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*b*).
DAY *v.* DAY - - - **Willmer J. 202**

6. —— *Divorce — Conflict of jurisdiction — Foreign decree based on residence—Husband domiciled in England — Wife resident in Germany — Wife's petition for divorce in Germany dismissed—Cross-petition for divorce of husband granted by German court — Whether husband's decree valid—Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *ss.* 6, 18 (1).
Conflict of Laws — Jurisdiction — Divorce—Comity.
Husband and Wife—Divorce—Residence—Petition based on wife's residence—Whether husband entitled to cross-petition—"Proceedings by a wife" — Meaning of "proceedings"—Matrimonial Causes Act, 1950, *ss.* 6, 18 (1).
Husband and Wife—Divorce—Discretion—Form of discretion statement — Propriety of preparation by lawyers.
Husband and Wife — Conduct conducing—Divorce proceedings as — Foreign divorce — Adultery before inception of proceedings. Condonation.
LEVETT *v.* LEVETT AND SMITH - **C.A. 156**

7. —— *Divorce — Conflict of jurisdiction — Foreign decree based on residence—Validity — Parties domiciled in England at time of decree — Husband's desertion of wife while resident in Finland—Parties then domiciled in Finland — Principle of comity — Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 18 (1) (*a*) *and* (*b*).
Conflict of Laws — Jurisdiction — Divorce—Comity — Recognition of foreign divorces — Wife's decree—Parties domiciled in England.
ARNOLD *v.* ARNOLD
Mr. Commr. Latey Q.C. 237

8. —— *Divorce—Death—Service of petition for decree of presumption of death and dissolution of marriage—Leave to dispense with service — Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 16 (1) (2)—*Matrimonial Causes Rules,* 1950 (*S.I.* 1950, *No.* 1940 (*L.*27)), *r.* 9 (5).
N. *v.* N., L. *v.* L., C. *v.* C. **Sachs J. 385**

9. —— *Divorce — Decree — Disclosure of petitioner's adultery after granting of decree nisi but before decree absolute—Proper course to be taken.*
GILL *v.* GILL - - - **Karminski J. 151**

10. —— *Divorce — Delay, unreasonable — Adultery — Knowledge thereof — Separtion of parties—Wife living in adultery for nine years prior to petition—Husband without knowledge of adultery until shortly before petition filed — Whether delay unreasonable — Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 4 (2).
BROWN *v.* LLOYD (ORSE. BROWN) AND LLOYD
Karminski J. 367

11. —— Divorce—Pleading. See ESTOPPEL.

12. —— *Divorce—Residence—Cross-petition based on wife's residence — Husband found domiciled abroad—Wife's three years' ordinary residence in England—Suit instituted by husband — Jurisdiction to grant wife a decree — Suit instituted by wife — No jurisdiction to grant husband a decree—Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *ss.* 6, 18 (1) (*b*).
RUSSELL *v.* RUSSELL AND ROEBUCK
Sachs J. 375

HUSBAND AND WIFE—*continued.*

13. —— *Divorce—Separation agreement—Rose* v. *Rose clause—Covenant not to plead, allege or give evidence of pre-deed matrimonial offences—Husband's petition alleging post-deed adultery—Wife's and co-respondent's answers alleging pre-deed cruelty and adultery and post-deed adultery—Prayer for exercise of discretion in petition and wife's answer—Distinction between inter partes rights of spouses and right of court—Estoppel—Rights of co-respondent where no prayer for costs against him—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 4—*Matrimonial Causes Rules*, 1950 (*S.I.* 1950, *No.* 1940 (*L.*27)), *rr.* 16, 28.
N. *v.* N. and L. - - - **Sachs J. 333**

14. —— *Justices—Refusal to adjudicate—Appeal—Jurisdiction of High Court—Wife's complaint of persistent cruelty, desertion for less than three years and wilful neglect to maintain—Refusal to adjudicate on ground that all matters more conveniently dealt with in High Court—Power of justices to divide matters and refer in part to High Court—Summary Jurisdiction (Married Women) Act*, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 10 *and* 11.
Davies *v.* Davies - - - **Divl.Ct. 357**

15. —— *Maintenance—Divorce—Judgment summons—Children—Order for payment of maintenance to two children of the marriage—Summons issued by wife as next friend of both—Separate summonses required in respect of each debt.*
Easterbrook *v.* Easterbrook
Collingwood J. 192

16. —— *Maintenance—Divorce—Paternity—Estoppel—Husband denying paternity—Maintenance order in favour of "child of the marriage" made by registrar—No jurisdiction in registrar to determine issue of paternity—Husband not estopped from denying paternity—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1)—*Matrimonial Causes Rules*, 1950 (*S.I.* 1950, *No.* 1940 (*L.*27)), *rr.* 27, 29 (1).
Husband and Wife—Paternity—Jurisdiction—Registrar.
Estoppel—Per rem judicatam—Husband and wife—Paternity.
Nokes *v.* Nokes - **Barnard J. and C.A. 213**

17. —— *Maintenance—High Court—Divorce—Consent order that respondent "pay or cause "to be paid" maintenance for children until* 21—*Death of respondent before children attain* 21—*Maintenance not payable from husband's estate—Whether jurisdiction in divorce court to order periodical payments for maintenance from respondent's estate—No cause of action subsisting against respondent's estate—Law Reform (Miscellaneous Provisions) Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 (1)—*Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1) (3).
Death.
Sugden *v.* Sugden
Karminski J. and C.A. 120

18. —— *Maintenance—High Court—Divorce—Order to pay school fees—Failure to comply with order—Right of attachment—Debtors Act*, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 4.
Contempt of Court—Debt—Maintenance order—School fees—Failure to pay—Right of attachment—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 4.
Farrant *v.* Farrant - - **Sachs J. 188**

19. —— *Maintenance—Justices—Divorce—Effect on maintenance order—Foreign divorce—Summary Jurisdiction (Married Women) Act*, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7.
Husband and Wife—Divorce—Conflict of jurisdiction—Maintenance—Foreign decree based on domicile—No notice to wife—Recognition of decree on status—Order under section 7 *of Summary Jurisdiction (Married Women) Act*, 1895—*Comity—Reciprocity—Effect of United States decisions.*
Wood *v.* Wood - **Divl.Ct. and C.A. 254**

20. —— *Maintenance—Justices—Enforcement of order—Appeal to Divisional Court—Procedure—Magistrates' Courts Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 87—*R.S.C.*, *Ord.* 59, *r.* 29.
Boulton *v.* Boulton - - **Divl.Ct. 9**

21. —— *Nullity—Incapacity—Curability—Impracticability of consummation.*
M. *v.* M. (orse. B.) - **Karminski J. 139**

22. —— *Practice—Interrogatories—Cruelty—Whether permissible—Matrimonial Causes Rules*, 1950 (*S.I.* 1950, *No.* 1940 (*L.*27)), *r.* 23.
Practice and Procedure—Interrogatories—Matrimonial causes.
Hulbert *v.* Hulbert - - - **C.A. 174**

JUDGMENT SUMMONS—to enforce maintenance order. See Husband and Wife—Maintenance.

JUSTICES—Enforcement of maintenance order. See Husband and Wife—Maintenance.

2. ——. See Husband and Wife.

LEGAL AID—*Costs—Taxation—Barrister—Fees of—Summons for review of taxation—Summons in name of assisted party—Jurisdiction to consider summons.*
Hammond *v.* Hammond **Karminski J. 349**

LEGAL AID—*continued.*

2. —— *Disposable income — Subject-matter of dispute — Order for alimony pending suit after application but before computation by National Assistance Board — Whether claim for alimony pending suit "the subject matter "of the dispute"—Legal Aid and Advice Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 51), *s.* 4 (3)—*Legal Aid (Assessment of Resources) Regulations,* 1950 (*S.I.* 1950, *No.* 1358), *reg.* 2—*Legal Aid (General) (Amendment No.* 1) *Regulations,* 1954 (*S.I.* 1954, *No.* 166).
Taylor (formerly Kraupl) *v.* National Assistance Board - - - - **C.A. 101**

MAINTENANCE—Death of respondent. See Husband and Wife.

2. —— Effect of foreign divorce on maintenance order. See Husband and Wife—Maintenance.

3. —— Enforcement of justices' order. See Husband and Wife.

MARRIAGE — Validity. See Conflict of Laws.

MASTER AND SERVANT. See Shipping—Collision.

MILITARY LAW—Allied forces—Validity of marriage. See Conflict of Laws.

NATIONAL ASSISTANCE — Assessment of alimony pendente lite. See Husband and Wife.

NATURAL JUSTICE. See Shipping.

NULLITY — Incapacity — Curability. See Husband and Wife.

PATERNITY — Estoppel — Registrar's jurisdiction. See Husband and Wife—Maintenance.

PLEADING—In divorce. See Estoppel.

PRACTICE — Interrogatories. See Husband and Wife.

2. —— *Payment into court—Tax deduction —Party entitled or obliged to deduct tax on interest of claim — Whether payment made with deduction of tax.*
Admiralty — Interest on damages — Tax deduction—Whether interest on claim is "interest of money"—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 169, 170—*Law Reform (Miscellaneous Provisions) Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 3 (1).
Revenue—Income tax—"Interest of money."
Rederi A/S Norseman and Rederi A/S Norse Lady *v.* British Transport Commission. The Norseman - **Lord Merriman P. 224**

RES JUDICATA—Divorce. See Estoppel.

RESIDENCE. See Husband and Wife—Divorce.

REVENUE — Income tax — "Interest of "money." See Practice — Payment into court.

SEQUESTRATION. See Bankruptcy.

SHIPPING — Carriage of goods — Action in rem. See Admiralty—Jurisdiction.

2. —— *Collision—Tug and tow—Negligence of crew of tug outside province of pilot of tow — Damage to third vessel — Liability of regular employer or hirer—All three vessels to blame—Separate and distinct faults of tug and of tow — Division of loss — Maritime Conventions Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 57), *s.* 1.
Master and Servant—Employment of servant of another—Employment pro hac vice.
Trishna (Owners, Master and Crew) *v.* M.S.C. Panther and Ericbank (Owners). The M.S.C. Panther and The Ericbank **Willmer J. 143**

3. —— *Court of formal investigation — Jurisdiction—Suspension of officer's certificate — Findings necessary to found jurisdiction — Form of report in quasi-penal proceedings — Report subsequently amended after reading in open court — Effect of amended report — Slip rule—Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 466, 470.
Natural Justice — Tribunal — Notice of decision.
Alsey Steam Fishing Co. Ltd. *v.* Hillman (Owners) and Others. The Kirknes **Willmer J. 51**

4. —— *Salvage—Personal award—Elements material—Tax element—Liability to taxation on award—Effect on award.*
Damages—Tax element.
Tantalus *v.* Telemachus, Her Cargo and Freight. The Telemachus - **Willmer J. 47**

TUG AND TOW—Collision. See Shipping.

W

BIBL. LONDIN. UNIV.

UL -4 JUN 1958